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Journal
UCLA School of Law Public Law & Legal Theory Series

Author
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Publication Date
2013-08-25

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THE YALE LAW JOURNAL

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The Moral Impact Theory of Law

ABSTRACT. I develop an alternative to the two main views of law that have dominated legal thought. My view offers a novel account of how the actions of legal institutions make the law what it is, and a correspondingly novel account of how to interpret legal texts. According to my view, legal obligations are a certain subset of moral obligations. Legal institutions—legislatures, courts, administrative agencies—take actions that change our moral obligations. They do so by changing the morally relevant facts and circumstances, for example by changing people's expectations, providing new options, or bestowing the blessing of the people's representatives on particular schemes. My theory holds, very roughly, that the resulting moral obligations are legal obligations. I call this view the *Moral Impact Theory* because it holds that the law is the moral impact of the relevant actions of legal institutions. In this Essay, I elaborate and refine the theory and then illustrate and clarify its implications for legal interpretation. I also respond to important objections.

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INTRODUCTION

In this Essay, I develop an alternative to the two main views of law that have dominated legal thought. My view offers a novel account of how the actions of legal institutions make the law what it is, and a correspondingly novel account of how to interpret legal texts. According to my view, legal obligations are a certain subset of moral obligations.[1] Legal institutions—legislatures, courts, administrative agencies—take actions that change our moral obligations. They do so by changing the morally relevant facts and circumstances, for example by changing people's expectations, providing new options, or bestowing the blessing of the people's representatives on particular schemes. My theory holds, very roughly, that the resulting moral obligations *are* legal obligations. I call this view the *Moral Impact Theory* because it holds that the law is the moral impact of the relevant actions of legal institutions.[2]

1. I clarify what I mean by moral obligations *infra* Subsection II.A.1.

2. In earlier work on the nature of law, I develop a variety of arguments that support a type of position along the lines of the Moral Impact Theory. This note provides references to that work for interested readers. The earlier work falls into three strands. The most important articles in the first strand are Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004), *corrected version reprinted in* EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN 225 (Scott Hershovitz ed., 2006) [hereinafter Greenberg, *How Facts Make Law*]; Mark Greenberg, *On Practices and the Law*, 12 LEGAL THEORY 113 (2006); and Mark Greenberg, *Hartian Positivism and Normative Facts: How Facts Make Law II*, *in* EXPLORING LAW'S EMPIRE, *supra* [hereinafter Greenberg, *How Facts Make Law II*]. For additional work in this vein, see Mark Greenberg, How Facts Make Law *and the Nature of Moral Facts*, 40 DIREITO, ESTADO E SOCIEDADE 165 (2012); Mark Greenberg, *Reasons Without Values?*, *in* 2 SOCIAL, POLITICAL, & LEGAL PHILOSOPHY 133 (Enrique Villanueva ed., 2007); and Mark Greenberg, *Explaining Legal Facts* (UCLA Sch. of Law, Working Paper No. 08-19, 2007), http://ssrn.com/abstract=1139135. These articles focus on the relation between the determinants of law and the content of the law. As they explain, it is fundamental to our ordinary understanding of the law that the determinants must provide reasons for the obtaining of the legal facts (in a sense of "reason" that I explicate). I argue that non-normative facts cannot by themselves determine the content of the law because they cannot explain their own relevance to the content of the law. Normative facts are the best candidates for what can provide the necessary reasons.

The second strand comprises Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39 (Leslie Green & Brian Leiter eds., 2011) [hereinafter Greenberg, *The Standard Picture*], and a work-in-progress, Mark Greenberg, Beyond the Standard Picture (unpublished manuscript) (on file with author). A central idea here, very roughly, is that a legal system is defective to the extent that it produces legal obligations that are not all-things-considered binding. As I argue, this idea points in the direction of a view on which legal obligations are a subset of moral obligations, and legal institutions create and modify legal obligations by modifying the morally relevant facts.

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In order to provide an informal introduction to the theory, I begin by illustrating the theory's account of statutory interpretation and contrasting that account with two more familiar accounts of statutory interpretation (those offered by the two main opposing views of law). I use an example drawn from the well-known case of *Smith v. United States*.[3] Smith had offered to trade a gun for cocaine. The Supreme Court divided over the question whether he was properly sentenced under a statute that provides for increased penalties if the defendant "uses . . . a firearm" in a drug-trafficking or violent crime.

According to a standard account of what statutory interpretation involves, in interpreting a statute, we seek the meaning or, better, the linguistic content of the statutory text.[4] This account is assumed without argument by both the majority and dissenting opinions in *Smith*.[5] *Smith* highlights a serious problem for this account, however. As the contemporary study of language and communication has made clear, there are multiple components and types of

In *The Standard Picture and Its Discontents*, I sketched the outlines of such a position in general terms. Greenberg, *The Standard Picture*, *supra*, at 57-60, 96-102. The version sketched there, which I called the *Dependence View*, was incomplete because, among other things, it took a position only on what constitutes the content of the law when the legal system operates as it is supposed to. The Moral Impact Theory is a way of developing the Dependence View according to which the content of the law is constituted in the same way when the legal system operates as it is supposed to and when it does not. *See id*. at 57-58. (There are a variety of other ways of developing the Dependence View; one possibility, for example, is to hold that when the legal system does not operate as it is supposed to, the legal obligations have the content of the moral obligations that would have been created had the legal system operated as it is supposed to.)

The third strand comprises Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011) [hereinafter Greenberg, *Legislation as Communication?*]. In this article, I argue that considerations from the study of language and communication are inadequate to explain the relevance of, and to adjudicate between, different candidates for a statute's contribution to the content of the law. Moral considerations are a promising candidate to provide what is missing.

3. 508 U.S. 223 (1993). In Section III.A, I use this example to explicate my theory's account of statutory interpretation in greater detail.

4. I do not mean to suggest that the account is standardly followed in practice. In fact, I think that the account does not well describe much of the actual practice of statutory interpretation. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 72-81. Rather, I mean that the account is a standard way of describing the practice. On the term *linguistic content*, see *infra* notes 18-19 and accompanying text. We will see that some linguistic contents are constituted by the contents of mental states, for example the contents of speakers' intentions.

5. For discussion of the opinions in *Smith*, see *infra* Section III.A.

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linguistic content.[6] In *Smith*, there are at least two types of linguistic content plausibly associated with the statutory text that would yield opposite outcomes in the case. First, there is the *semantic content* of the statutory text—roughly, what is conventionally encoded in the words. Second, there is the *communicative content*—roughly, what the legislature intended to communicate (or meant) by enacting the relevant text.[7]

Trading a firearm is within the semantic content of the phrase "uses a firearm," so the semantic content yields the result that Smith was properly sentenced. Plausibly, however, Congress intended to communicate that using a gun *as a weapon* was to receive an increased penalty.[8] For illustrative purposes, I will assume that this was Congress's intention—what Congress meant. Thus, the communicative content yields the result that Smith should not have been sentenced to the increased penalty.

The familiar account according to which interpreting a statute is extracting its linguistic content has no way of adjudicating between multiple linguistic contents of the statutory text. The statutory text in *Smith* has both a semantic content and a communicative content, and they point in opposite directions. The account therefore offers no answer to the problem posed by Smith's trading a gun for cocaine.

The opposing account of statutory interpretation associated with Ronald Dworkin's influential theory of law instructs us to seek the principle that best fits and justifies the statute.[9] In *Smith*, we have two salient candidate principles: that use of a gun for any purpose in connection with a violent or drug crime warrants additional punishment; and that use of a gun as a weapon in connection with a violent or drug crime warrants additional punishment. Both principles fit about equally well—after all, the Supreme Court was sharply divided over which of these two better captured the meaning of the statutory text, and we have noted that both are plausibly linguistic contents of the text. On Dworkin's account, the question then becomes which principle is morally better—i.e., which principle would, ex ante, be a better one to have.[10]

6. *See infra* notes 38-39, 97-99 and accompanying text.

7. On this distinction, see *infra* note 97 and accompanying text.

8. As discussed below, Justice Scalia's dissenting opinion may have been groping for this idea, though Scalia was not able to put it in these terms because he lacked the distinction between semantic content and communicative content. *See infra* note 105 and accompanying text.

9. I have argued that fit and justification are best understood as two dimensions of justification. *See infra* notes 29, 34 and accompanying text.

10. *See infra* text following note 32; *infra* note 34.

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Assuming that one principle is better than the other, Dworkin's account thus does offer an answer to our problem. But the way in which it does so is problematic. At least in general, a straightforward appeal to which interpretation yields a morally better standard does not seem permissible in legal interpretation.

On the account of statutory interpretation implied by my theory of law, we interpret a statute by seeking to discover what impact the enactment of the statute, along with relevant circumstances, had on our moral obligations. Thus, 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. What is the moral consequence of the fact that a majority of the members of the legislature, with whatever intentions they had, voted for this text, with its semantic content? Thus, for example, the semantic content and the communicative content of the statutory text are relevant if, and to the extent that, moral considerations, such as considerations of democracy and fairness, make them relevant. It might be argued on democratic grounds, for example, that the fact that popularly elected representatives intended to communicate a particular decision provides a reason in favor of citizens' being bound by that decision. But the upshot of democratic considerations is a complex matter. A counterargument could be mounted that such a decision is binding on citizens only to the extent that it is encoded in the meaning of the words that the legislature used—mere intentions are not enough. Or it might be argued that, in the actual circumstances of a particular enactment, for reasons of both fairness and democracy, the public's understanding of a statute's effect matters more than the legislature's actual intentions or the meaning of the words. To the extent that moral considerations point in different directions, interpreting the statute will require determining what the moral impact of the statute is, after all of the relevant values have been given their due. And the answer to this question may not correspond to any linguistic content of the statutory text.

It's worth noticing how natural this account of statutory interpretation is. Return for a moment to the standard account, according to which statutory interpretation seeks the linguistic content of the statutory text. When faced with two or more linguistic contents that are competing candidates for a statute's contribution to the law, it is very natural to appeal to considerations such as democracy and fairness to try to adjudicate between them. For example, one might try to argue that certain democratic considerations require that the statute be interpreted in accordance with what the legislature intended to communicate, rather than in accordance with the semantic content of the text. Once we have gone this far, it is difficult to resist the conclusion that we need to ask what the moral implications of the statute's enactment are on

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balance, that is, taking *all* of the relevant values into account, as opposed to what certain aspects of democracy or fairness by themselves would support.

I have just sketched a way in which the Moral Impact Theory makes a difference at a relatively practical level—with respect to our understanding of statutory interpretation. Before concluding this Introduction, I would also like to indicate how the theory relates to a larger understanding of law's nature and, in particular, of what law, by its nature, is *supposed* to do or is *for*.[11] Often our moral situation is worse than it could be in a particular way—namely, that it would be better if our moral obligations (and powers, and so on) were different from what they in fact are. For example, consider a situation in which a community faces a problem, and there are many different ways to go about solving the problem. For a variety of reasons—for instance, because one person's efforts toward any given solution would not make a difference without participation by many others—it is not the case that anyone has a specific obligation to participate in a particular solution. But it would be better if everyone did have such an obligation. The legal system can change the moral situation for the better by changing the circumstances so that everyone does have the obligation to participate in a particular solution. Although I will not argue for it here, my view is that it is part of the nature of law that a legal system is supposed to change our moral obligations in order to improve our moral situation—not, of course, that legal systems always improve our moral situation, but that they are defective as legal systems to the extent that they do not.

The Moral Impact Theory fits smoothly into this background understanding of law. Legal institutions take actions to change our moral obligations by changing the relevant facts and circumstances. (In Section II.B., I explore a variety of ways in which they are able to do so.) With important qualifications, the resulting moral obligations *are* legal obligations. If a legal system is, by its nature, supposed to change moral obligations, it is not surprising that the central feature of law—its content—is made up of the moral obligations that the legal system brings about. Moreover, the view that a legal system is supposed, not merely to change moral obligations, but to do so in a way that *improves* the moral situation will, as we will see, play an important role in determining which of the moral obligations that result from actions of legal institutions are legal obligations.

11. For elaboration of the idea that it can be part of the nature of law that legal systems are supposed to play a certain role, though actual legal systems often fail to do so, see Greenberg, *The Standard Picture*, *supra* note 2, at 86-89.

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Here is the plan for the rest of the Essay. In Part I, I situate the Moral Impact Theory more fully by contrasting it with two dominant views of law. In Part II, I develop the theory, beginning with a rough formulation and gradually refining it. In Part III, I illustrate the theory's implications for legal interpretation in greater detail than I did at the start. In Part IV, I address two important objections to the theory.

I. SITUATING THE THEORY

The Moral Impact Theory stands in opposition to two dominant views of law. In the Introduction, I sketched the difference between the Moral Impact Theory's account of statutory interpretation and those of the dominant views. In this Part, I introduce the two opposing views properly and explain briefly how the Moral Impact Theory differs from them.

A few preliminaries. In a jurisdiction like that of the United States or Massachusetts or France there are many legal obligations, powers, privileges, and permissions. I will refer to all of the legal obligations, powers, and so on in a given jurisdiction at a given time as *the content of the law*.[12] (For brevity, when context prevents confusion, I will sometimes simply use *the law* for the content of the law.[13]) It is uncontroversial that at least many facts about the content of the law in a given jurisdiction are not among the ultimate facts of the universe.[14] Rather, we can explain why those facts obtain in terms of more basic facts, including, of course, facts about what various legal institutions such as legislatures, administrative agencies, and courts did and said and decided. I will use the term *determinants of legal content*—or *determinants*, for short—for the more basic facts that determine the content of the law.[15]

A *theory* (or *view*) of law, in the sense in which I use the term, is a constitutive explanation of the content of the law—i.e., an explanation of which

12. Strictly 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.

13. On different senses of the term *law*, see *infra* Subsection II.A.3.

14. I say "at least many," rather than "all," because some natural law theorists would maintain that some legal norms are simply fundamental moral norms and that those moral norms are among the ultimate facts of the universe. Thanks to Seana Shiffrin for pressing me to clarify this point.

15. There is a technical issue regarding whether the determinants of legal content are facts, events, states of affairs, etc. I will generally take them to be facts, but nothing in the argument depends on this assumption.

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aspects of which more basic facts are the determinants of legal content, and of how those determinants together make it the case that the various legal obligations, powers, and so on are what they are.[16] An example of the sort of thesis that could be part of a theory of law is the thesis that the content of constitutional law in the United States is constituted by the original public meaning of the text of the U.S. Constitution.

The first of the two dominant views of law is the *Standard Picture*. According to this vague picture—I hesitate to call it a theory—the content of the law is primarily constituted by linguistic (or mental) contents associated with the authoritative legal texts.[17] The Standard Picture is extremely widely taken for granted, and assumed to be common ground (though it is rarely explicitly espoused). In characterizing the Standard Picture, I use the phrase "linguistic content" rather than "meaning" because the latter has multiple senses, and I am trying to get at a particular one—what we might call *meaning, strictly speaking*.[18] Some linguistic contents are constituted by the contents of

16. On constitutive explanation, see Mark Greenberg, *A New Map of Theories of Mental Content: Constitutive Accounts and Normative Theories*, 15 PHIL. ISSUES 299 (2005).

17. The point of the qualification "primarily" is that the Standard Picture allows that there may be some divergence from its core model. There may be peripheral ways in which law can be determined other than by the linguistic content of authoritative pronouncements, and the Standard Picture also must supplement its core model with an account of how the content of the law as a whole is derived from the individual legal norms that are constituted by individual authoritative pronouncements. There needs to be, for example, a way of resolving conflicts between such individual norms, and the Standard Picture may even allow some more radical departures, such as filtering out or modifying absurd or immoral legal norms. For elaboration and discussion of what this idea of primariness amounts to, see Greenberg, *The Standard Picture*, *supra* note 2, at 51-54. For a more nuanced account of the Standard Picture generally, see *id.* at 40-55.

18. Language enables us reliably and systematically to convey information to others. The information thus conveyed is linguistic content. There are a variety of aspects of linguistic meaning, including semantic content and speaker's meaning. The important point for our purposes is that linguistic contents can be systematically derived through reliable mechanisms, mechanisms that are much studied in philosophy of language and linguistics. Contrast *meaning* in this sense with a loose nonlinguistic sense of the word. In the latter sense, meaning is roughly equivalent to significance, upshot, or consequence. For example, one might ask the meaning of a recent political development or of an embarrassing situation. Meaning in this sense is not a kind of linguistic content at all. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 47-48. Meaning in the sense of linguistic content also is to be distinguished from *legal meaning*, where the legal meaning of, say, a statutory text is simply its contribution to the content of the law. If we use *meaning* in the sense of legal meaning, it is trivial to say that a statute's contribution to the law is its meaning. In these terms, the Standard Picture holds, roughly, that an authoritative legal text's linguistic content constitutes its legal meaning. For discussion of many types of linguistic and mental

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mental states. For example, on a common view, the speaker's meaning of an utterance is determined by the content of certain of his or her communicative intentions. Moreover, the Standard Picture is often relaxed to include the contents of other mental states associated with an authoritative text, such as the content of a legislature's intention to achieve particular legal effects by enacting a statute.

The Standard Picture has deep roots in ordinary thought about the law. A simple version of this picture is encapsulated in the layperson's idea that the law is what the code or law books say. And among legal philosophers, the Standard Picture is widely taken for granted.[19] One reason is that it dovetails with—and indeed fills a gap in—legal positivism, the most widely held position in philosophy of law.[20] A central positivist thesis is that the content of the law

content and their relation to the content of the law, see Greenberg, *Legislation as Communication?*, *supra* note 2.

19. It is also plausible that many lawyers, judges, and law professors (other than legal philosophers) take the Standard Picture for granted to the extent that they talk and think about the theoretical issue of the relation between the determinants and the content of the law. Certainly, practitioners and scholars often say that the goal of legal interpretation is to ascertain the "meaning" of a legal text, such as a statute. (The majority and dissenting opinions in *Smith* are an example.) It might be suggested, however, that such talk of the "meaning" of a statute should be understood to refer to legal meaning—the statute's contribution to the content of the law—not to its linguistic content. If "meaning" refers to legal meaning, however, then it is vacuous to say that in working out a statute's contribution to the law, we should seek the statute's meaning. More likely, many have not clearly recognized the distinction between a statute's linguistic content and a statute's contribution to the content of the law. And failing to make this distinction is, itself, a way of presupposing the Standard Picture. With respect to the failure to make the distinction, Mitchell Berman and Kevin Toh point out that "the relevant ambiguity [between the linguistic content of the text and the content of the law] is close to ubiquitous in originalist writing," and "in nonoriginalist writing too." Mitchell N. Berman & Kevin Toh, *On What Distinguishes New Originalism from Old: A Jurisprudential Take*, 82 FORDHAM L. REV. 545, 547 & n.11 (2013). I should emphasize that I am not suggesting that the actual practice of legal interpretation reflects the Standard Picture. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 72-81. My point is, rather, that when lawyers, judges, and law professors describe what they are doing, many seem to assume the Standard Picture.

20. Where does the American Legal Realist movement fit in? Legal realism was an important movement, but not really a participant in the debate over what determines the content of the law; one main strand of realism largely took for granted the central positivist thesis. To simplify greatly, legal realists accept the positivist understanding of what determines the content of the law, but they take a much more pessimistic (or perhaps realistic) view of the extent to which those sources of law are capable of yielding determinate legal norms. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 65 n.31; Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001). For discussion of the legal realists' indeterminacy thesis and Dworkin's theory, see Mark Greenberg, *Implications of*

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depends, at the most fundamental level, only on social facts, understood as non-normative, non-evaluative facts.[21] But legal positivism does not specify *how* social facts determine the content of the law. To say that the content of the law is determined, at the most fundamental level, by social facts alone does not yet tell us, for example, how statutes contribute to the content of the law. One manifestation of this gap is that positivism by itself does not yield an account of statutory interpretation—of how to *discover* a statute's contribution to the content of the law. How do we get from the fact that a given statute was enacted to the statute's contribution to the content of the law?

In general, it is a difficult problem to say how practices, decisions, and the like determine unique norms.[22] The Standard Picture offers what appears to be an easy solution: the linguistic contents of the authoritative pronouncements *are* the contents of the legal norms. Moreover, the solution 1) is intuitively appealing to many (as noted, the idea that the law is what the texts say has deep roots in ordinary thought), and 2) requires no appeal to moral or other normative facts. Unsurprisingly, then, the Standard Picture *is* the standard positivist view with respect to that issue.[23] The Standard Picture yields the

Indeterminacy: Naturalism in Epistemology and the Philosophy of Law II, 31 LAW & PHIL. 619, 629-38 (2012). Others might have taken the conclusion that the content of the law is substantially indeterminate to be a *reductio* of the positivist premises, but the legal realists embraced indeterminacy. *See* Mark Greenberg, *Naturalism in Epistemology and the Philosophy of Law*, 30 LAW & PHIL. 419, 441, 447 (2011).

21. Legal positivism is not monolithic; several characteristic positivist theses can be distinguished. *See, e.g.*, JOSEPH RAZ, THE AUTHORITY OF LAW 37-52 (1979); Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

22. On this problem, see Greenberg, *How Facts Make Law*, *supra* note 2; Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 568, 613-17 (1998). *See also* Greenberg, *The Standard Picture*, *supra* note 2.

23. I argue elsewhere that H.L.A. Hart's version of legal positivism, the most influential position in contemporary philosophy of law, assumes the Standard Picture. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 54-55, 60-61, 69. I also provide other evidence that the Standard Picture is taken for granted by many philosophers of law, including natural law or anti-positivist theorists. *See id*. at 60-72. John Finnis, for example, seems to accept the Standard Picture, holding that the content of the law is the content of authoritative pronouncements. He then goes on to claim that such internally valid law is not legally authoritative "in the focal sense" unless it is morally authoritative. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 27 (1980). For a legal positivist position that rejects the Standard Picture, see SCOTT J. SHAPIRO, LEGALITY (2011). As he has explained in personal communication, Shapiro holds that the content of the law is determined by the content of certain plans, and he holds that the content of the relevant plans is not constituted by the linguistic content of the planning texts (or the contents of the planners' intentions). One

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account of statutory interpretation, discussed in the Introduction, according to which the interpretation of a statute is primarily a matter of extracting its linguistic content—an account that would be accepted by most positivists.

The widespread assumption of the Standard Picture also plays a role in explaining legal positivism's influence. Unlike positivism, the Standard Picture is typically an implicit assumption that is rarely explicitly acknowledged or defended—and, indeed, it is often assumed to be common ground.[24] And the widespread assumption of the Standard Picture biases the debate in favor of legal positivism. Because the Standard Picture holds that the law is primarily constituted by the contents of authoritative pronouncements, it leaves only a limited role that morality could play. All of the anti-positivist options that, given the Standard Picture, are most naturally taken to be available suffer from obvious and serious problems.[25]

This completes my introduction of the Standard Picture, the first of the two dominant views to which my view is opposed. In sum, the Standard Picture is widely taken for granted, and assumed to be common ground, by contemporary philosophers of law (though it is rarely explicitly espoused).[26]

The second main view is that of Ronald Dworkin, which, though well-known and influential, is far less widely accepted than the Standard Picture.[27] Dworkin conceives of the law as an underlying, idealized source from which all legal practices flow. More specifically, the content of the law is the set of principles that best *morally justifies* past legal and political practices.[28] Dworkin

reason for this is the role of "meta-interpretation" in constituting the content of the plans. *See id.* at 331-87.

24. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 60-72.

25. *See id.* at 62-66. I do not mean to endorse the position that the only anti-positivist positions consistent with the Standard Picture are obviously false. *See id.* at 65 n.32. My goal is rather to explain why one who sees the law through the lens of the Standard Picture will tend to find it difficult to see why anti-positivism would be at all attractive and would entirely miss the possibility of anti-positivist positions such as Dworkin's or my own.

26. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 61-62 & nn.22-25.

27. Indeed, I have argued elsewhere that Dworkin's view has been widely misunderstood because legal theorists have taken for granted that the Standard Picture is common ground. They have therefore wrongly taken Dworkin's view to be a perverse way of developing the Standard Picture. In particular, they have taken Dworkinian interpretation to be a way of working out the linguistic content of the legal texts. *See id.* at 64-65.

28. Dworkin sometimes formulates his theory to include in the content of the law not just the principles but also propositions that follow from them. He does not explicate the relevant notion of "following from," but presumably the idea is that the principles imply more specific propositions. For example, the principle that no one can benefit from his or her own

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famously explicated the relevant kind of moral justification with his notions of fit and justification.[29]

wrong implies the proposition that one who murders a testator cannot inherit under the will. *See* RONALD DWORKIN, LAW'S EMPIRE 15-20 (1986). The qualification about propositions that follow from the principles does not affect the points I make in the text, and I will omit it for simplicity.

Dworkin's flagship statement of his view is *Law's Empire* (1986). And many of the ideas were first developed in *Taking Rights Seriously* (1977) and *A Matter of Principle* (1985). Near the end of *Justice for Hedgehogs* (2011), however, Dworkin briefly suggests that he now holds a very different view. *See* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 405-09 (2011). The discussion is highly compressed, but one reading is that Dworkin's new position is that the content of the law is that part of the moral profile that is created by the actions of legal institutions *and* that the courts are morally obligated to enforce. In other words, on this reading, the new position is a version of the Moral Impact Theory that restricts legal rights and obligations to those that should be enforced by courts. Another reading, however, is that the new position is simply that the content of the law is whatever the courts are morally obligated to enforce: "Legal rights are those that people are entitled to enforce on demand, without further legislative intervention, in adjudicative institutions that direct the executive power of sheriff or police." *Id.* at 406. This latter position seems to be the view that Dworkin adopts in his posthumous article, Ronald Dworkin, *A New Philosophy for International Law*, 41 PHIL. & PUB. AFF. 2, 12 (2013). A serious problem with both positions is that they 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. For example, it is a familiar idea that the President and Congress may have legal duties that the courts should not enforce. For a powerful argument that constitutional law goes well beyond what the courts should enforce, see Lawrence Gene Sager's classic article, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). For Dworkin's response, which seems to assume that his own account is correct, see DWORKIN, JUSTICE FOR HEDGEHOGS, *supra*, at 412-13. Another problem with the appeal to what courts should enforce is that an account of law should help us to *explain* why courts should enforce some rights and not others; we therefore cannot appeal to what courts should enforce in order to explain what is law.

In personal conversations, Dworkin acknowledged the shift in his views. In the text, when I refer to Dworkin's view, I mean the well-known view expounded in *Law's Empire*, not the view Dworkin briefly suggests in his very late work.

29. *See* DWORKIN, LAW'S EMPIRE, *supra* note 28, at 45-275, esp. 284-86; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977). I have argued that fit is best understood as one aspect of justification. *See* Greenberg, *How Facts Make Law*, *supra* note 2, at 263 n.47. Otherwise, Dworkin's account relies on two unrelated dimensions, one non-normative and the other normative, and has no way of balancing them against each other. Perhaps because of this problem, Dworkin often presented the view as holding that the law is the morally best principle that meets some threshold level of fit. This version of the view is also problematic, both because it has no principled way of determining what level of fit is enough and because it gives such a large role to moral merit in determining the content of the law. *See infra* note 34.

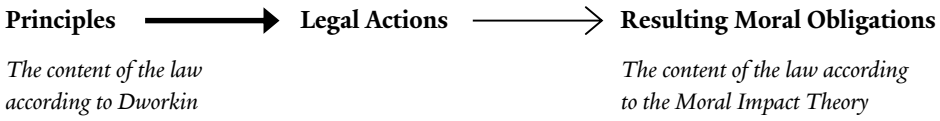
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The Moral Impact Theory, like Dworkin's theory and unlike the Standard Picture, holds that the relation between legal practices and the law is a moral one. But, unlike Dworkin's theory, the Moral Impact Theory holds that the law is the moral *impact* or *effect* of certain actions of legal institutions—i.e., the moral obligations that obtain in light of those actions—rather than the set of principles that best justify them. To use a spatial metaphor, on the Moral Impact Theory (as on the Standard Picture), the law is *downstream* of the legal practices; on Dworkin's theory, by contrast, the law is *upstream* of the legal practices. Figure 1 illustrates this contrast.[30]

Figure 1.

THE MORAL IMPACT THEORY CONTRASTED WITH DWORKIN'S THEORY OF LAW

The thick arrow represents moral justification, and the thin arrow represents moral consequence.



There are several other closely related differences between the Moral Impact Theory and Dworkin's view. First, the Moral Impact Theory makes no appeal to Dworkinian interpretation—that distinctive form of interpretation according to which the basic question is which interpretation would make the legal system the best it can be, or, more specifically, which principles best morally justify the practices of the system. In fact, according to the Moral

The relevant notion of moral justification cannot be the ordinary one. On the ordinary notion, for an action to be morally justified is for it to be supported or required by the balance of reasons. Many of the actions taken by legal institutions are not supported or required by the balance of reasons. Therefore, when Dworkin seeks the principles that best justify all the past practices of a legal system, he is seeking principles that best justify actions that are not in fact morally justified in the ordinary sense. Because the practices are often not morally justified, the principles that best justify them will not in general be true moral principles. Roughly, Dworkin's idea is that in trying to find the principles that best justify the relevant practices, there is a trade-off between increasing the degree of fit and improving the moral merit of the principles. I think that there are serious difficulties with how to understand the relevant notion of moral justification, but this is a topic I cannot address here.

30. One caveat about Figure 1: I do not mean to take a position on the idea of principles that morally justify all legal actions. As noted *supra* note 29, I think that there are serious difficulties with the relevant notion of moral justification.

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Impact Theory, working out the content of the law is not a genuinely hermeneutic enterprise—rather, it involves straightforward moral reasoning about the moral consequences of various facts and circumstances. Second, according to the Moral Impact Theory, the content of the law is a subset of what morality, taking into account all the relevant considerations, requires. By contrast, there is no obvious reason why the set of principles that best morally justifies the actual practices of a legal system would be a subset of what morality requires. Certainly, Dworkin never argues for or even suggests any such claim.[31] On the face of it, one might expect that the principles that best fit and justify the actual, often severely morally flawed, practices would be principles that one should not follow, even given the existence of the legal practices. And, in fact, Dworkin accepts that legal requirements may not be moral requirements, indeed that law may be "too immoral to enforce."[32] Finally, the Moral Impact Theory does not license an argument that because a standard would be a morally good one ex ante, it is part of the content of the law. On Dworkin's view, however, the fact that a principle is more morally justified counts in favor of its being part of the content of the law; moreover, as we saw with respect to the *Smith* example, whenever the competing candidate principles fit roughly equally well, the fact that a principle is more morally justified is decisive. In sum, though both the Moral Impact Theory and Dworkin's theory afford morality an important role, they offer very different accounts of the content of the law.

The three views considered here yield very different understandings of legal interpretation as well. The Standard Picture holds that legal interpretation involves answering the question: what is the *linguistic content* of the legal texts? On this picture, there is little or no role for moral reasoning in legal interpretation, except perhaps when the legal texts explicitly involve moral terms.[33]

31. If Dworkin had believed that the set of principles that best justifies all of the practices of a legal system coincides with what is morally required in light of the legal practices, it would have been extremely strange for him not to have said so. Moreover, in that case, it would be unclear what the point would be of introducing his distinctive account of legal interpretation with its unusual notion of the principles that best justify the practices. *See supra* note 29. He could simply have taken the straightforward view of the Moral Impact Theory—that legal obligations are the moral obligations that come about as a result of the actions of legal institutions.

32. *See, e.g.*, DWORKIN, LAW'S EMPIRE, *supra* note 28, at 262.

33. As discussed *supra* note 17, once the linguistic content of the legal texts has been extracted, yielding legal norms, the Standard Picture does allow a secondary role for morality in, for example, filtering or even filling gaps in the legal norms.

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On Dworkin's view, legal interpretation involves answering the question: which principles best *morally justify* the legal practices? In terms of the heuristic that Dworkin often used to explain his account of legal interpretation, it involves finding the most morally justified interpretation that sufficiently well fits the legal practices.[34] The Moral Impact Theory rejects both understandings of legal interpretation. It takes the question of legal interpretation to be: what is *morally required* as a consequence of the lawmaking actions? And it does not understand the universe of lawmaking actions to consist exclusively of issuing texts. When the relevant actions *do* involve issuing texts, the linguistic content of those texts is only one relevant consideration in the calculation of the moral impact of the actions.

The prominence of the Standard Picture and the Dworkinian view may make it seem that there is a stark choice: either legal interpretation does not involve moral reasoning or it involves the kind of moral reasoning that Dworkin spells out—moral reasoning directed at answering the question of which candidate interpretation makes the legal system "the best it can be,"[35] to use Dworkin's phrase. The Moral Impact Theory opens a third way: legal interpretation involves moral reasoning about what is required as a consequence of the relevant lawmaking actions.[36]

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34. *See* DWORKIN, LAW'S EMPIRE, *supra* note 28, at 284-85, 387-88; DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 29, at 340-42. I have argued that, contrary to the way Dworkin often presented the view, the idea of a threshold of fit beyond which substantive moral considerations take over should be regarded as merely a heuristic or expository device. *See* Greenberg, *How Facts Make Law*, *supra* note 2, at 263 n.47. On what I take to be the better view, finding the principles that best justify the practices involves a trade-off between fit and justification. *See supra* note 29. This understanding would somewhat mitigate the directness of Dworkin's reliance on the problematic idea that a principle can be law because it is morally good. But, as pointed out in the text above, it is still the case that a principle's moral merit counts in favor of its being part of the law. And when two candidate principles fit the practices about equally well, moral goodness is decisive.

35. DWORKIN, LAW'S EMPIRE, *supra* note 28, at 379.

36. I contrasted the three accounts of statutory interpretation in the Introduction. In Part III, I illustrate the implications of the Moral Impact Theory for legal interpretation in more detail.

In this Essay, my goal is to offer a theory of law—an explanation of how the determinants make the content of the law what it is. I contrast my theory's account of statutory interpretation with the accounts yielded by the Standard Picture and Dworkin's theory because those are the dominant theories of law. There are, of course, many other accounts of statutory interpretation, but most lack a theory of law, and I therefore don't consider them. To take just one example, Justice Stephen Breyer's account of statutory and constitutional interpretation advises us to take a variety of factors into account. *See* STEPHEN BREYER, ACTIVE LIBERTY (2006). But he does not offer a theory of law according to which

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I mentioned in the Introduction one reason that the Moral Impact Theory is a natural position. We can now recognize several other, closely related reasons. First, at least for many theorists, it is plausible that moral reasoning has a place in legal interpretation. But, as mentioned above, it seems wrong to think that the relevant kind of moral reasoning is moral reasoning concerning which interpretation of a legal text would be ex ante morally preferable. The Moral Impact Theory's account of statutory interpretation allows a role for moral reasoning that is more procedural. We ask about the moral implication of the fact that, say, the legislature enacted a statute or a court decided a controversy in a particular way, not about which interpretation of the statute or judicial opinion would be morally best. As we will see, the fact that a legal institution acted in a particular way can, along with background circumstances, change our moral obligations—for example, making participation in a particular scheme morally obligatory, despite the fact that the scheme is seriously morally flawed.

Second, legal systems treat legal obligations as genuinely binding obligations that are generated by the legal institutions. The Moral Impact Theory vindicates this treatment. It maintains that the legal obligations are the genuinely binding obligations that are generated by the legal institutions. By contrast, on the Standard Picture, the legal obligations are simply constituted by the linguistic contents of the pronouncements of legal institutions. In general, there is no reason to think that such "obligations" are genuinely binding. For similar reasons, legal positivists have struggled to explain the use of the term *legal obligation*. For example, influential positivists have argued that to say that there is a legal obligation is to say that, from the perspective of the legal system, there is a moral obligation.[37] The account thus denies the commonsense view that a legal obligation is a kind of obligation at all. For, on this view, it can be true that one has a legal obligation despite the fact that one has no obligation (as long as the legal system takes one to have a moral obligation).

Third, the Moral Impact Theory makes it easy to explain our dominating concern with law. We generally treat the law not merely as one relevant consideration among many, but as a central concern, indeed as excluding the

these factors have the corresponding role in determining the content of the law. That is, he does not argue that we should give a particular consideration a certain relevance in interpreting a statute because that consideration in fact has that relevance in determining the content of the law.

37. *See* SHAPIRO, *supra* note 23, at 185-88; *see also* JOSEPH RAZ, PRACTICAL REASON AND NORMS 171-77 (1975).

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relevance of other considerations. It is easy to understand why we would have such interest in the moral consequences of the legal practices. If the legal institutions change what we are obligated to do, it is vital to work out that change. By contrast, it is much less easy to understand why we would be interested in identifying the principles that best justify the legal practices (or that make them the best they can be). More precisely, although we might be interested in such principles, for example because of the value of principled consistency, they would be merely one relevant consideration in reaching practical judgments.

A similar point applies to the Standard Picture. The ordinary meaning of the legal texts is obviously a relevant consideration in practical deliberation, but it is hard to see why it would deserve the central and exclusive focus of attention that the Standard Picture gives it. This point is even stronger than it might at first appear because, as noted above, there are typically multiple different types of linguistic and mental content associated with each authoritative legal text. In the case of a statute, for example, there is the semantic content of the text, what the legislature intended to communicate, what the legislature asserted, what the legislature presupposed and implicated, what the legislature would reasonably be taken to have intended to communicate, what legal effect the legislature intended to achieve, and so on.[38] Proponents of the Standard Picture typically assume that, without appeal to moral considerations, one type of content can be identified as *the* one that constitutes the content of the law.[39] But it is unclear why we should be exclusively concerned with one such content. On the Moral Impact Theory, all of the linguistic and mental contents associated with the legal texts are among the factors that are potentially relevant to our obligations. They—and other morally relevant factors—are given whatever relevance they in fact deserve.

38. *See* Greenberg, *Legislation as Communication?*, *supra* note 2, at 230-33, 241-50.

39. *See id.* at 222-26, 229-30; Greenberg, *The Standard Picture*, *supra* note 2, at 42-55, 63-66. I argue that linguistic considerations are inadequate to determine which of those linguistic contents is the relevant one for legal purposes. Nonlinguistic considerations, such as moral ones, have to be introduced in order to adjudicate between the competing linguistic contents. To make things worse, once we introduce such considerations, they often support other candidates for the content of the law that are not linguistic contents of the relevant texts. *See* Mark Greenberg, *Legislation as Communication?*, *supra* note 2; Greenberg, *The Communication Theory of Legal Interpretation and Objective Notions of Communicative Content* (UCLA Sch. of Law, Research Paper No. 10-135, 2010), http://ssrn.com/abstract=1726524.

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II. THE THEORY

In this Part, I develop the Moral Impact Theory in three stages. Section A makes a few preliminary clarifications and refinements. Section B explains, via several examples, how legal institutions can change our moral obligations, thereby creating legal obligations. Finally, Section C clarifies how the theory distinguishes *legal* obligations from other moral obligations.

We can begin with a rough and incomplete formulation of the theory:

> *The Moral Impact Theory* (version 1): The legal obligations are those moral obligations created by the actions of legal institutions.

On my view, legal institutions take various kinds of actions, such as voting on bills and deciding cases, that change our moral obligations. The resulting moral obligations are our legal obligations.

A. Preliminary Clarifications and Refinements

1. What Do I Mean by Moral Obligations?

My usage of the term *moral* is relatively standard, but, because the term is used in various ways, I offer brief clarification. The relevant obligations—the ones that, according to my theory, are legal obligations—are simply *genuine, all-things-considered, practical* obligations.

Let me take the italicized terms in reverse order. First, the relevant obligations are *practical* ones—i.e., obligations that concern what one should *do*, as opposed to what one should think or feel.[40] Thus, for example, we are not concerned with epistemic obligations, which concern the formation and revision of beliefs. (The law of evidence does not concern what the finder of fact should believe, but rather concerns such questions as what evidence may be presented to the finder of fact and what evidence the finder of fact may consider.)

Second, the relevant obligations are all-things-considered obligations, as opposed to merely pro tanto ones. If one makes a promise to pick up a friend at the airport, and one's mother becomes severely ill, then taking all of the

40. I am using the term *practical* here in a relatively narrow sense to concern only questions of what to do. In a broader sense, practical questions would include questions of what to feel or what sort of character to have. Thanks to David Plunkett for suggesting clarification here.

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relevant considerations into account, one should not pick up the friend at the airport. The obligation may still exist, and consequently one might be morally required to apologize or to make up for its breach. In a terminology that has become standard, we can say that the obligation to pick up the friend is, in light of the mother's illness, merely a pro tanto obligation. By contrast, an all-things-considered obligation is one that, taking all relevant considerations into account, one should fulfill.[41]

Third, the point of saying that the relevant obligations are *genuine* is not that there are two types of obligations, genuine ones and non-genuine ones. Rather, the point is to distinguish my usage from what we might call the sociological sense of the term "obligation" (and of other normative terms such as "reason," "right," and so on). To say that a group has an obligation to perform some action in the sociological sense is to say, roughly, that members of the group *believe* that they have such an obligation (and perhaps have other relevant attitudes and tendencies, such as disapproval of people who do not perform the action in question). An anthropologist might say, for example, that for a particular group it is obligatory (in the sociological sense) to follow particular dietary laws.[42] The fact that members of a group believe that something is obligatory obviously does not imply that they have any genuine obligation. For instance, the fact that a cult believes that it is obligatory to sacrifice one's firstborn child does not imply that this action is obligatory. On

41. The Moral Impact Theory is a work in progress, and the claim that the relevant moral obligations are all-things-considered, rather than pro tanto, moral obligations is probably the aspect of the theory that I advance most tentatively. I am tempted by an alternative version of the theory, on which whatever pro tanto moral obligations come about in the appropriate way—*the legally proper way*—would be legal obligations. (On the important idea of the legally proper way, see *infra* Section II.B.) Some of these obligations would be merely pro tanto, not *bottom-line*, legal obligations. (Bottom-line legal obligations are those that, after taking into account all of the relevant legal considerations, have not been overridden or outweighed. For example, one who escaped from prison to avoid being burned to death in a fire may breach a pro tanto legal obligation but not a bottom-line legal obligation. In normal parlance, *legal obligation* is used for bottom-line legal obligations.) On this alternative version of the theory, conflicts between pro tanto legal obligations would be resolved in accordance with what the underlying moral considerations, on balance, require. *See infra* Part IV. The obligations that win out would be the bottom-line legal obligations. These legal obligations might not be all-things-considered moral obligations; they could be overridden or outweighed by other moral considerations. I am grateful to Selim Berker, Barbara Herman, Scott Hershovitz, David Plunkett, and Scott Shapiro for discussion of these issues.

42. To avoid confusion, I will not use "obligation" (or other normative terms) in the sociological sense.

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my theory, what matters is not whether people believe that they have certain obligations, but whether they actually do.[43]

In my view, genuine, all-things-considered, practical obligations are all-things-considered moral obligations.[44] I therefore will often refer to such obligations as *moral obligations*. (For brevity, I generally omit the qualification *all-things-considered*.)

2. *The Moral Profile*

As a shorthand, I have been writing of obligations. But the content of the law includes more than just obligations. For example, it includes powers, privileges, and perhaps permissions. When I write about the way in which legal institutions change our moral obligations, I mean to include the way in which they change our moral obligations, powers, privileges, and so on. I have coined the term *moral profile* to cover all of these, but, for convenience, I sometimes write "moral obligations" or just "obligations."[45] With this clarification, the theory can be reformulated more precisely:

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43. There will sometimes be controversy over whether particular putative obligations are genuine. The existence of such controversy does not make the notion of genuine obligation problematic—any more than controversy over which beliefs are true makes the notion of a true belief problematic. Indeed, as Ronald Dworkin was fond of pointing out in discussion, in a typical disagreement about what people are obligated to do, both sides agree that genuine obligations exist; the disagreement concerns the content of the obligations. There are difficult questions about what makes it the case that, for example, someone has a particular obligation, but we need not address such questions for purposes of this paper. Talk of genuine obligations does not presuppose any particular metaethical view, for example objectivism or subjectivism about morality.

Some theorists maintain that there are no genuine obligations (reasons, rights, and so on). This is not the place to address such radical moral—indeed normative—skepticism. In this Essay, I assume what most of us take for granted in our daily lives—that there are reasons for performing some actions rather than others, obligations to do certain things and not to do others, and so on. Although I cannot argue against normative skepticism here, it is worth noting that much of our concern with law presupposes that such skepticism is false. On the skeptical view, people have interests and desires and wield raw power, but there is no reason to be concerned with unfairness, inequality, cruelty, or injustice.

44. What matters is that, on my view, legal obligations are genuine, all-things-considered, practical obligations. As noted in the text, I think such obligations are moral. But one who is an error theorist about morality specifically but has no quarrel with genuine practical normativity can still accept the essence of my view. For extended discussion and qualification of a closely related point, see Greenberg, *The Standard Picture*, *supra* note 2, at 81-84.

45. For the term *moral profile*, see *id.* at 56-57.

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The Moral Impact Theory (version 2): The content of law is that part of the moral profile created by the actions of legal institutions.

3. Legal Texts Versus Legal Standards

It will be important to distinguish different uses of the term *law*. As a mass noun, *law* can refer to the content of law or to the legal system. As a count noun, *a law* can refer either to an authoritative legal text (such as a statute or ordinance or a provision thereof) or to a legal standard, requirement, rule, or principle. It is this latter distinction that I want to emphasize here.[46] An authoritative legal text is a linguistic entity. By contrast, a legal standard is a norm. Texts and norms are fundamentally different kinds of things. A text may express a norm, just as a numeral may express a number or a sentence may express a thought. But a text is no more a norm than the Roman numeral "IV" is the number four or than the sentence "*c'est la vie*" is the thought that that's life. (If the distinction is not immediately evident, consider the moral case. No one would confuse the moral norm against causing unnecessary suffering with a sentence or text.) Moreover, it is a substantive claim that the issuance of an authoritative text makes it the case that a legal norm corresponding to the linguistic content of the text obtains.[47] Indeed, it is the central thesis of the Standard Picture.

Despite the obviousness of the distinction, legal practitioners and scholars habitually use terms such as *statute* and *provision* interchangeably with terms such as *rule* and *standard*. The prevalence of the Standard Picture explains these habits. On the Standard Picture, although texts are not norms, there will be a relatively straightforward correspondence between texts and norms.[48]

The Moral Impact Theory is an account of how actions of legal institutions, including importantly the issuance of authoritative texts, make it the case that legal norms obtain. And, according to the Moral Impact Theory, the relation between texts and norms will be more complex than the Standard Picture would have it.[49] Although using terms for legal texts and legal norms

46. On the distinction, see also *id.* at 66-67.

47. *See* Greenberg, *Legislation as Communication?*, *supra* note 2, at 219.

48. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 66-67. As I say there, I don't mean to suggest that legal scholars are confused about the difference between texts and rules. *Id.* at 67 n.34.

49. Even on the Moral Impact Theory, there will tend to be rough correlations between statutory provisions and legal norms. *See id.* at 59.

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interchangeably is harmless in many contexts, in the present context it will be important to distinguish carefully between statutes and norms. To avoid confusion, I will be careful to use *statute*, *provision*, and the like exclusively for texts, and to use *standard*, *norm*, and the like exclusively for norms. And I will not use *law* as a count noun without explicit clarification.

B. How Legal Institutions Change the Moral Profile

How can legal institutions like legislatures and courts change our moral obligations? On the Standard Picture, legal institutions issue authoritative legal pronouncements—statutes, judicial decisions, and the like—the linguistic content of which becomes the content of the law simply in virtue of the fact that it was authoritatively pronounced. We can express this idea by saying that, on the Standard Picture, authoritative legal pronouncements change our legal obligations *directly*.[50] This change in legal obligations may, depending on the circumstances, affect moral obligations. Thus, on the Standard Picture, the standard way for legal institutions to change our moral obligations is by directly changing our legal obligations (by issuing authoritative legal pronouncements).

On the Moral Impact Theory, by contrast, the idea is not that legal institutions change the moral profile by changing the content of the law. Any such suggestion would be viciously circular given that, according to my theory, the changes in the content of the law brought about by the legal institutions are to be explained by the changes in the moral profile brought about by the legal institutions. Instead, the idea is that legal institutions change our moral obligations by changing the relevant circumstances (and not by doing so via changes in the content of the law). There are many different tools that legal institutions can use to bring about such changes in the moral profile.

I can best explain with examples. I use them to illustrate ways in which legal institutions can change our moral obligations by changing the relevant circumstances, thus creating legal obligations. The crucial point is that the examples do not involve changing the moral profile by changing the content of

50. For extensive discussion of the relevant sense of directness, see *id.* at 44-51. The main point is that, according to the Standard Picture, a legally authoritative pronouncement explains the validity of a legal norm *without explanatory intermediaries*—that is, not by explaining something else which then explains the norm's validity. As I explain, the absence of explanatory intermediaries is consistent with the possibility that the making of an authoritative pronouncement is not sufficient for the corresponding norm's being legally valid.

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the law, but, rather, changing the content of the law by changing the moral profile. I will come back to this point about the direction of explanation below.[51]

First, the establishment of a legal system and the actions of legal institutions in maintaining security and punishing wrongdoers can make it morally impermissible to use violence. Without a legal system, it may be morally permissible for people to use violence against others who attack or threaten to attack them or their families or allies. Indeed, it may be morally permissible for people to use violence against others who are endangering their well-being in other ways, for example by taking food or water on which they rely. By maintaining a monopoly on the use of force, effectively protecting people against violence, and reliably punishing wrongdoers, a legal system can make violence morally impermissible, except in a very narrow range of circumstances. Notice that, in this example, actions of legal institutions other than the issuance of texts play an important role in improving the moral situation.

Second, given the great moral importance of advance notice of punishment and the indeterminacy—or at least uncertainty—with respect to what punishment is morally appropriate, the punishment of wrongdoers is in general morally problematic without action by legal institutions.[52] A legal system plausibly can make punishment morally permissible by giving notice of which morally wrong acts are punishable and what the corresponding punishments will be.

Third, in the punishment example, the actions of legal institutions are able to make determinate and knowable aspects of morality that are otherwise either relatively indeterminate or uncertain. There are many other cases of this and related phenomena. For example, it is clear that agents who break at least some promises have resulting obligations to the promisee, but there is a great deal of uncertainty about what sorts of remedial actions are appropriate with respect to different promises, and it is plausible that there are frequently a variety of different ways in which the remedial obligations can be met.[53] Once the legal system provides certain contract remedies, however, people who make promises act against that background, and this can render determinate and certain or otherwise change what is morally required in the event of breach.

51. *See infra* text accompanying and following note 63.

52. As is standard, I am distinguishing punishment from the use of force to defend myself or others from an imminent threat.

53. *See* Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007).

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The case of accidental breach is a nice example. Ex ante, it is unclear and perhaps indeterminate what remedy is morally required if one breaches a promise accidentally. The actions of legal institutions make the remedy for accidental breach of a legally binding promise clear and determinate.[54]

Fourth, consider the familiar example of a coordination problem.[55] It is sometimes important that all or nearly all people act in the same way, though there are several equally good ways in which everyone could act. It is important, for example, that everyone use electrical outlets that meet the same specifications, though there are many different specifications that would work equally well. Suppose a legislature directs everyone to adopt a particular solution. In the simplest kind of case, this action by the legislature may well have the effect of making the specified solution more salient than the others. As a result, given the moral reasons for following the solution that most other people are likely to follow, everyone may now have a moral obligation to adopt the specified solution.

Matters may be more complicated, however. Because of a wide variety of factors—established practices in the relevant industry, early misunderstandings of the legislation by a particularly influential company or by government inspectors, basic features of human psychology, new technological developments not predictable when the legislature acted, and so on—the result of the legislature's action may be that a solution that is somewhat different from the one specified by the legislature becomes the most salient one. That solution may therefore come to be morally obligatory, despite the fact that it does not correspond to the linguistic content of the statute.

In both kinds of cases, the legislature has changed the moral profile, creating a new moral obligation. On my account, this new moral obligation counts as a legal obligation because of the way in which it came about.

Fifth, to the extent that people have the ability to participate equally in governance, legal institutions can harness democratic considerations to alter the moral landscape. Promises and agreements are a useful analogy. By making promises and entering into agreements, people change their moral obligations. The fact of agreement has moral force. Even if what was agreed on is an arrangement that is seriously morally flawed—a different arrangement would

54. Thanks to Seana Shiffrin for this example. On other ways in which the law makes the remedies more determinate, see *id.* at 720-21 & n.17.

55. There is a vast literature on coordination problems. For seminal discussions, see DAVID LEWIS, CONVENTION (2002); and THOMAS SCHELLING, THE STRATEGY OF CONFLICT (1960).

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have been much fairer, for example—the fact that the arrangement was agreed on may be sufficient to create a moral obligation.

Similarly, the fact that a decision is reached by a procedure that is part of a system of governance in which everyone has an equal opportunity to participate has moral force. I don't mean to suggest that people are morally bound by any decision of a legal institution in a democratically constituted government. But to the extent that self-government results in an arrangement, there are moral reasons for people to abide by the arrangement. I will generally refer to such moral reasons as "democratic considerations," "reasons of democracy," or the like.

It is a complex matter what democratic considerations support. It certainly cannot be assumed that democratic considerations always translate into some simple formula, such as whatever a popularly elected legislature intended.[56] For example, there are familiar ways in which legislatures fail to be accountable to the public.[57]

According to the Moral Impact Theory, the relevance of democratic considerations does not derive from the history and traditions of our legal system. It is not, for example, that we are seeking principles that fit and justify our practices, and, because those practices happen to be democratic, the relevant principles turn out to be democratic. Rather, it is a general moral truth that, to the extent that people have equal opportunity to participate in procedures of governance, they acquire moral reasons to comply with the decisions that are reached through those procedures. Democratic

56. Mitchell Berman provides an astute discussion of problems with arguments that democracy (as well as other values) straightforwardly implies that the Constitution must be interpreted in accordance with its original meaning. Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 69-75 (2009).

57. For discussion of some democratic failings of legislatures, see Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1134. For nuanced accounts of what democracy supports with respect to constitutional interpretation, see CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001); and LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF CONSTITUTIONAL PRACTICE (2004). It is worth noting that, contrary to what is sometimes assumed, the obligation that a promise generates may not correspond exactly to the linguistic content of the promise. For discussion, see Greenberg, *Legislation as Communication?*, *supra* note 2, at 238-39. Bernard Williams may have something like this in mind when he says: "[P]romises in informal contexts are less than contracts: neither the agent nor the recipient need fall back on every word of what was originally understood." BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY 112 (2002). (In my view, the situation with respect to contracts is more complex than Williams's comment implies.)

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considerations therefore are relevant in all legal systems, not just those with democratic traditions. Of course, to the extent that a legal system is part of a system of government that does not allow people to participate, it will not be effective at harnessing democratic considerations.

It is worth noting that, as with agreements, democratic considerations can provide moral support for seriously morally flawed arrangements. The fact that the democratic process has settled on a particular scheme provides reasons for compliance with that scheme, even if the scheme is far from the best scheme that could have been chosen.

I want to emphasize that, in appealing to democratic considerations, I do not mean to suggest that there is a general moral obligation to comply with directives of popularly elected representatives in the circumstances of contemporary nations. There is a widespread consensus that there is no such general moral obligation, and I think that the consensus is correct.[58] Indeed, I have elsewhere argued that one of the attractions of my account of law is that it explains how legal systems can generate morally binding obligations despite the fact that there is no general moral obligation to obey directives from legal authorities.[59] Although there is no such general moral obligation, democratic considerations can reinforce other factors of the sort that my examples illustrate, yielding moral obligations in particular cases. For example, in the case of a coordination problem, the fact that the solution was democratically chosen may add democratic considerations to the other considerations, such as salience, supporting the solution. In general, in real cases, the different kinds of considerations illustrated by the examples often reinforce each other.

Sixth, legal institutions can create moral obligations to participate in specific schemes for the public good, such as paying taxes. Without a legal system, people will have general moral obligations to help others. But there will often be no moral obligation to give any particular amount of money to any particular scheme. For one thing, especially when it comes to problems of any complexity, many different possible schemes are likely to be beneficial, and the efforts of many people are needed for a scheme to make a difference. Nothing determines which possible scheme is the one that people should participate in. In addition, there is no mechanism for people to participate in one common scheme. By specifying a particular scheme and making it salient, creating the mechanism for everyone to participate in that scheme, and ensuring that others will not free-ride, legal institutions can channel the pre-

58. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 99-100.

59. *See id.* at 84-102.

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existing, relatively open-ended, moral obligations into a moral obligation to pay a specified amount of money into that scheme.[60]

Again, the moral obligation that legal institutional action brings about may be to participate in a scheme that is seriously morally flawed. Suppose that it is very important to have some mechanism in place for solving a particular problem, for example, preventing violence or ensuring clean drinking water. Then, if a particular solution has the best chance of being implemented, it may be morally required to do one's part in that scheme even if it is significantly worse than—for example, more unjust than—the ex ante best solution to the problem. The fact that legal institutions are implementing a particular scheme can make it the case that that scheme has the best chance of being adopted and therefore that it is morally obligatory. Similarly, once a particular morally flawed rule has been widely adopted and relied on, it may be unfair not to follow it. What legal institutions actually *do*, not merely the linguistic content of their pronouncements, can therefore play an important role. And, as in the case of a coordination problem, the scheme that becomes morally obligatory as a result of legal institutional action may not be one that corresponds to the linguistic content of any pronouncement.

In certain kinds of situations, however, the linguistic content of directives will be morally binding. Court orders directed at specific individuals are a good example. Because of the overwhelming moral importance of having a way of ending disputes peacefully, there are powerful moral reasons to give binding force to such specific orders.[61]

I should emphasize that I am not suggesting that making a particular scheme salient, creating a mechanism for participation, and preventing free-riding are necessarily sufficient to create the relevant moral obligation. It will depend on all the circumstances. A corresponding caveat applies more generally across the examples.

Seventh, the point about the legal system's ability to ensure participation is of great general importance. In many situations, one person's taking action toward some community benefit will be worthless, or nearly so, without the actions of many others. In such cases, if there is no reasonable expectation that

60. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 45 (1986). Raz uses the example in developing his account of authority. I do not mean to suggest that the new moral obligation replaces the pre-existing moral obligations. People will continue to have relatively open-ended moral duties, such as a duty of beneficence. Thanks to Barbara Herman for pressing me to clarify this point.

61. *See infra* Section IV.B.

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others will cooperate, there is likely no moral requirement that a particular person should participate. By using the threat of coercion, legal institutions can ensure the participation of others, thus removing this obstacle to a moral obligation to participate.

Eighth, and finally, the adjudication of cases is another way in which legal actors can change the moral profile. The considerations relevant to the impact of a judicial decision on the moral profile are complex. I will briefly explicate these considerations by sketching how the actual practice of interpreting appellate case law can be explained as the result of the interaction between them.[62]

To begin with, note that on the Standard Picture, working out an appellate decision's contribution to the law should be a matter of identifying an authoritative text—which might be only some portion of the judicial opinion—and then extracting its linguistic content. Indeed, at least once the relevant text is identified, interpreting appellate decisions should be no different from interpreting statutes.

Our actual practice is very different. The standards that appellate courts announce and the reasoning that they offer are given substantial attention, but they are far from the end of the story. In deciding how to resolve a new case in light of a past decision (or decisions), a past decision can be distinguished by pointing out that the present case has relevantly different facts, even if the present case falls within the standard apparently announced by the court in the past case. Moreover, the standards announced in the past case can be treated as nonbinding dicta on the ground that they go beyond what was necessary for resolution of the case.

According to the Moral Impact Theory, considerations of fairness support treating like cases alike, so the fact that a case is resolved in a particular way provides a reason for treating relevantly similar cases in the same way in the future. To the extent that we must treat like cases alike, the resolution of cases will generate standards that affect the proper resolution of future cases. On the other hand, at least for many kinds of issues, democratic considerations favor the creation of standards by representative bodies such as legislatures. Thus, there is an apparent tension between these two kinds of considerations.

But treating like cases alike does not warrant privileging the way in which the court explains its decision or the standards that it announces. What matters with respect to treating like cases alike is whether future cases are in fact

62. *See also* Greenberg, *The Standard Picture*, *supra* note 2, at 73-75.

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relevantly similar to the past case, and that is a moral question, not a question of what the court in the past case said. Therefore, treating past decisions as governing only relevantly similar cases—through the practices of distinguishing past decisions and treating the announcement of rules as dicta—can be seen as a way of reconciling the value of treating like cases alike with democratic considerations that militate against courts' creating general standards.

The situation is more complicated, however. Depending on the legal system's practices with respect to precedent, the court's reasoning and any standard that it announces may create expectations and, for that reason, engage fairness considerations. Moreover, even though a court does not represent the interests of constituents in the way that a legislature does, democratic values having to do with public deliberation give weight to a court's public offering of reasons in support of a standard. Thus, these other aspects of fairness and democracy explain the careful attention given to past courts' explanations of their decisions.

This concludes my discussion of ways in which legal institutions can change the moral profile. I emphasize two points about the examples. First, even when, as is typical, the relevant action includes the issuance of some kind of text, the content of the law is not determined simply by the meaning of the text. Rather, the content of the law depends on the moral significance of the fact that the legal institution took the action in question (including the issuance of the text). Judicial decisions illustrate this point well.

Second, in the examples, various kinds of action by government officials, not just pronouncements, alter the moral profile. The examples involve, among other things, the actions of legal officials in setting up actual mechanisms for collecting taxes, protecting people from violence, and taking or threatening enforcement action against shirkers to enforce people's participation in collective schemes.

As noted, my examples involve actions by legal officials. But how does the legal system instigate appropriate action by officials? If the legal system gets legal officials to act by instructing them to do so, and if such instructions generate legal obligations to act as instructed, then does my account tacitly assume at least some part of the Standard Picture's understanding of how legal obligations are generated?

This objection is off target. A preliminary point is that officials often do not need to be specifically instructed how to act. Legislators propose legislation, vote on bills, and so on without legal instructions specifying what legislators are to do. Similarly, courts and executive officials take a wide range of actions without specific instructions.

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More importantly, although authoritative pronouncements, such as statutes, regulations, and executive orders, are an important part of the way in which a legal system gets officials to act, this use of authoritative pronouncements is not in tension with my theory. As noted above, for familiar reasons, ordinary citizens in contemporary nations, even democratic ones, do not have a general moral obligation to do what the legislature or other legal institutions command.[63] Government officials are an important exception, however. The moral obligation of officials is generally overdetermined. They have explicitly consented to the government, have voluntarily assumed an obligation to carry out the instructions of their superiors, and have accepted benefits that they could easily have declined. Therefore, unlike the situation with respect to ordinary citizens, the legal system *can* typically generate moral obligations of government officials simply by specifying what they are required to do. And those moral obligations, on my account, *are* legal obligations.

Even in such circumstances, however, the Moral Impact Theory affords authoritative pronouncements a role that is crucially different from the one envisioned by the Standard Picture. According to the Standard Picture, legal obligations come about simply because the relevant content is authoritatively pronounced. By contrast, on the Moral Impact Theory, when circumstances obtain in which authoritative pronouncements are capable of generating corresponding moral obligations, the pronouncements change the content of the law via a change in the moral profile. For example, an executive order directing legal officials to act generates a moral obligation for those officials to act accordingly. This moral obligation comes about not simply because the order was authoritatively issued, but also because of the morally relevant background circumstances—for example, that the officials have voluntarily assumed an obligation to obey, have accepted benefits, and so on. The consequent moral obligation is a legal obligation, so the explanation of the legal obligation goes through the relevant moral considerations.

More generally, there are special circumstances in which commands do generate moral obligations to do what is commanded. That the person commanded is an official of the legal system is simply one such special circumstance. When the relevant circumstances obtain, authoritative pronouncements provide a shortcut for a legal system. The legal system can use such pronouncements to generate moral obligations—and these moral obligations, according to the Moral Impact Theory, are themselves legal

63. On the consensus that there is no such general moral obligation, see Greenberg, *The Standard Picture*, *supra* note 2, at 99-101.

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obligations. In sum, legal systems can use diverse tools to generate moral obligations. Those tools include, under appropriate circumstances, authoritative pronouncements.[64]

I hope that the examples have clarified the point that I highlighted earlier about the direction of explanation. It is not that a legislature or court pronounces a norm, which thereby becomes a valid legal norm, and, because of moral reasons for obeying the law, ultimately gives rise to a genuine (moral) obligation. The order of explanation between the legal obligations and the moral obligations is reversed in my account: the legislature votes or the court decides a case, thus possibly creating genuine obligations through the kinds of mechanisms I have been illustrating. Those genuine obligations then are legal obligations.

The examples also are suggestive of what law and legal systems, by their nature, are *supposed* to do or are *for*.[65] In many of the examples, it would be better if people's obligations were different from what they in fact are, and the actions of legal institutions have the potential to improve matters by changing the relevant circumstances, thus changing moral obligations. As mentioned in the Introduction, my view (which I do not argue for in this Essay) is that it is part of the nature of law that a legal system is supposed to improve our moral situation in the kind of way that I have described—not, of course, that legal systems always improve our moral situation, but that they are defective as legal systems to the extent that they do not.

C. Clarifying Which Moral Obligations Are Legal Obligations

Thus far, I have written informally of that part of the moral profile created by legal institutions. We need to do more to pin down which moral obligations are legal obligations.

1. Pre-Existing Moral Obligations

In some instances, legal norms have content that is the same as, or at least similar to, that of pre-existing moral norms. For example, the criminal law

64. For discussion of the special case of particularized orders (ones directed at particular individuals), such as an order issued by a court after a final judgment, directing a particular individual to pay a particular sum of money, see *infra* Section IV.B.

65. For elaboration of the idea that it can be part of the nature of law that legal systems are supposed to play a certain role, though actual legal systems often fail to do so, see Greenberg, *The Standard Picture*, *supra* note 2, at 86-89.

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includes many legal obligations, such as obligations not to harm or kill other people, that have content closely related to moral norms that exist independently of the law. Thus, it might be thought that the relevant moral obligations are not created by the actions of legal institutions and therefore are not legal obligations. In that case, the Moral Impact Theory would have the consequence that some of what we take to be paradigmatic legal obligations, such as the obligation not to kill, are not legal obligations at all.

The needed refinement is that we must understand "that part of the moral profile created by the actions of legal institutions" to include obligations that are *altered* or *reinforced* by the actions of legal institutions. (Rather than rewording the official statement of the theory, I will simply stipulate this clarification.)

I begin with obligations that are altered. When a legislature enacts a criminal prohibition on conduct that is already morally prohibited, the legislature's action typically alters the content of the obligation.[66] There are at least two kinds of alterations in content—changes in the first-order content of the obligation, and changes in the remedies available in case of a violation. Consider the case of statutory rape. Before action by legal institutions, the content of the moral prohibition will be relatively vague, perhaps something along the lines of: sex with children is prohibited. Once the legal institutions have acted, the content of the prohibition will typically be much more precise. For example, the actions of the legislature may result in a precise age of consent. The content may become more precise in various other ways, for example, with respect to whether the prohibition applies to everyone or only to adults, whether the sex of the victim and perpetrator matter, whether there are exceptions for marriage, and so on.

Next, legislative action will also typically alter the remedies or punishments for a violation of an obligation. Morality tends to be rather vague about remedies. In the case of punishment, perhaps morality says that a punishment must be proportional to the wrong, but offers little precise detail about what punishments would be proportional to specific wrongs. Indeed, as I suggested above, in part because of this indeterminacy, punishment is in general morally problematic without action by legal institutions. An important way in which legislation alters pre-existing moral obligations is therefore by making

66. The term *altered* may be misleading. The original, relatively vague moral prohibition will often remain in force. On the other hand, a reason for using the term is that the pre-legal moral reasons are part of the explanation of the new prohibition. Thanks to Scott Hershovitz for pressing me to clarify this point.

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determinate the appropriate punishments for violations of those obligations. (I address below the related issue of eliminating uncertainty about moral obligations that are in fact determinate.) Legislation can thus make it morally permissible to punish violators.[67]

In addition to altering pre-existing moral obligations, a legislative enactment of a criminal prohibition (on conduct that is already morally prohibited) typically results in new reasons for not engaging in the relevant conduct. The examples discussed above are relevant here. For example, the legislative action will often add reasons of fairness and democracy to the pre-existing moral reasons. When reasons are added for engaging in conduct that is already obligatory, let us say that the pre-existing obligations are *reinforced*.[68] The Moral Impact Theory holds that moral obligations that are reinforced by the actions of legal institutions are among the moral obligations that are legal obligations.

2. *The Legally Proper Way*

The next refinement of the theory is that legal obligations are not just any moral obligations that are created by the actions of legal institutions. We need to limit the relevant moral obligations to ones that come about in the appropriate way—what I call the *legally proper* way.[69] We have an intuitive understanding of the legally proper way for a legal system to generate obligations, and we can articulate it theoretically by appealing to what legal systems are *for* or are supposed to do. Let me explain. Suppose a government persecutes a particular minority group. This persecution may include directives to harm members of that group or to deny them benefits. Such government

67. Scott Hershovitz argues that the new obligation (the criminal law obligation) is to the state, and that is why it is permissible to punish violators. *See* Scott Hershovitz, *The Authority of Law*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 65 (Andrei Marmor ed., 2012). On that view, all criminal law obligations differ from the pre-existing moral obligations on the dimension of to whom the obligation is owed.

68. The obligations may be strengthened as a result. But, in my stipulative use of the term, to say that the obligations are reinforced is neutral with respect to whether the obligations are strengthened. Adding reasons against engaging in certain conduct can also have the salutary epistemic effect of dispelling uncertainty about the existence of an obligation, one that already in fact obtains.

69. When the actions of legal institutions do not generate new obligations but merely result in additional reasons for pre-existing moral obligations, then, strictly speaking, I should talk of the moral obligations that are reinforced in the appropriate way, rather than those that come about in the appropriate way.

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actions are likely to have the effect on the moral profile of producing an obligation to protect or rescue the minority group, to disobey the directives, to try to change the policy, and so on. It is intuitively clear that an obligation that comes about in this way is not a legal obligation, despite the fact that it is the result of actions of legal institutions.

The example suggests a necessary condition on the legally proper way for legal institutions to change the moral profile. If legal institutional action, by making the moral situation worse, generates obligations to remedy, oppose, or otherwise mitigate the consequences of the action, such obligations to mitigate have not come about in the legally proper way. Call this general way of changing the moral profile *paradoxical* (because the resulting obligations run in the opposite direction from the standard case). Moral obligations that are produced in the paradoxical way are not legal obligations.

It is important to note that legal institutional action that generates moral obligations in the paradoxical way may also generate other moral obligations that are legal obligations. For example, Proposition 13, the 1978 California ballot initiative that restricted property taxes, made the moral situation worse and may therefore have generated moral obligations to try to repeal it, but it nevertheless generated legal obligations concerning the assessment of property taxes.[70]

The necessary condition I have sketched matches our intuitive understanding of the way in which legal systems are supposed to generate obligations, and it is not ad hoc. As I mentioned above, on my view, a legal system, by its nature, is supposed to change the moral situation for the better. This understanding of what legal systems are supposed to do, or what they are for, explains why moral obligations that are generated in the paradoxical way are not legal obligations. The key idea is that, for an institution that, by its nature, is supposed to improve the moral situation, a method that relies on creating reasons to undo what the institution has wrought is a defective way of generating obligations.[71] I have illustrated my suggestion that we can use our

70. Thanks to Seana Shiffrin for suggesting this example. Legal institutional action can also fail to generate legal obligations. *See infra* Section IV.B.

71. Such a method could, in a particular case, ultimately improve the moral situation overall, for example by producing a backlash against the legal system, or even a revolution. The paradoxical method is not a reliable way of improving the moral situation in *normal* circumstances, however. In general, accounts of what makes an object or system with a point or function defective depend on a distinction between normal and abnormal circumstances (for the relevant type of object or system). For example, under certain circumstances, a heart with a leaky valve may be better at circulating blood than a heart

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understanding of what law and legal systems are supposed to do to explain which ways of generating obligations are legally proper—and therefore which obligations are *legal*. But I do not have a complete account of the legally proper way; further work is needed.[72]

> *The Moral Impact Theory* (version 3): The content of law is that part of the moral profile created by the actions of legal institutions in the legally proper way.

3. *What Makes Something a Legal Institution*

Because my formulation of the theory uses the term *legal institution*, I want to conclude this Part by addressing briefly the question of what makes something a legal institution.[73] Although it is not the goal of the Moral Impact

without a leak. But a heart with a leaky valve is nevertheless defective because such a heart will not generally be effective at circulating blood under the circumstances that are normal for hearts.

72. There are other interesting ways in which legal institutions can generate moral obligations that are intuitively not "legally proper." For example, suppose that a legislature explicitly states that it is merely suggesting, not mandating, a proposed solution to a coordination problem. Despite the precatory language, the legislative pronouncement could have the effect of making the proposed solution more salient than others, thereby generating a moral obligation to adopt that solution. It would seem peculiar to characterize this moral obligation as a legal obligation. (Thanks to Ben Eidelson for raising this example.) On my view, the reason that the resulting moral obligation does not count as a legal obligation derives from another aspect of the nature of legal systems. In *The Standard Picture and Its Discontents*, I argue that a legal system, by its nature, is supposed to generate all-things-considered binding obligations. Greenberg, *The Standard Picture*, *supra* note 2, at 84-96. I call this the *bindingness hypothesis*. The hypothesis is not that generating binding obligations is an aim of legal systems, but rather that it is a constraint on how a legal system is to go about fulfilling other aims, such as changing the moral situation for the better. *Id.* at 88-89. Because legal systems are supposed to change the moral situation for the better by generating all-things-considered binding obligations, an institution that explicitly purports not to be generating binding obligations is not acting in the legally proper way. Therefore, the obligations that result, even if they happen to be all-things-considered binding, are not legal obligations.

73. As a preliminary matter, it is worth noting that the answer to this question is less critical for my theory than it is for theories of law that presuppose the Standard Picture. On the Moral Impact Theory, by contrast with such theories, there is no claim that legal institutions have the special power to create legal obligations merely by issuing pronouncements according to specified procedures. On the Moral Impact Theory, moreover, legal obligations are a subset of genuine obligations, and whether we classify institutions as legal or not has no effect on what we take our genuine obligations to be. Thus, the distinctions between legal and non-

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Theory to provide a theory of the nature of legal systems and institutions, I will offer a necessary condition. An important part of what it is to be a legal institution is to be part of a legal system, so an account of the nature of legal institutions depends on an account of the nature of legal systems. On my view of law, again, it is essential to legal systems that they are supposed to improve the moral situation. Therefore, a necessary condition on a legal institution is that it be an organization that, by its nature, is supposed to improve the moral situation.[74] (Again, the claim is not that legal institutions always improve our moral situation, but that they are defective to the extent that they do not.) This point explains, for example, the fact that an organization of powerful thugs that controls a community is not a legal system or a legal institution. It is no part of the organization's nature that it is supposed to improve the moral situation. Scott Shapiro makes a similar argument in *Legality*.[75]

The foregoing is one necessary condition on legal systems and institutions; there are certainly other necessary conditions. It is not my purpose here to develop a complete account—the Moral Impact Theory is consistent with a range of accounts, and others have done important work on this topic. For example, Joseph Raz argues that legal systems are distinguished from other institutionalized systems by their claiming authority to regulate any type of

legal obligations and between legal and non-legal institutions are less important than on many other theories.

Having said this, it is an important question what makes an institution a legal institution. For example, which institutions are legal, and therefore which obligations are legal, will have implications for which obligations a legal system should enforce.

74. The claim in the text is too quick. That a legal *system*, by its nature, is supposed to improve the moral situation doesn't entail that every legal *institution* is supposed to do that. Some legal institutions might have minor supporting roles. But it is part of the Moral Impact Theory that the legal institutions that are relevant for its purposes—the ones that generate those moral obligations that are legal obligations—are ones that are supposed to improve the moral situation. As Ben Eidelson pointed out to me, this point is really an elaboration of the notion of the legally proper way of changing the moral profile, discussed above. That is, in order for a change in the moral profile to come about in the legally proper way, it must be the result of action by a legal institution that, by its nature, is supposed to improve the moral situation. The bindingness hypothesis, *see supra* note 72, may also yield a necessary condition on a legal institution.

75. SHAPIRO, *supra* note 23, at 213-17. We disagree, however, about what makes it the case that the law has a particular aim or is supposed to do something. On Shapiro's view, "[t]he law possesses the aim that it does because high-ranking officials represent the practice as having a moral aim or aims." *Id.* at 216-17. On my view, such representations are only one determinant of what law is for or is supposed to do.

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behavior and by their claiming to be supreme.[76] Shapiro argues that Raz's analysis fails to capture the relevant distinction; he offers, instead, the thesis that a legal system must be self-certifying, i.e., "*free* to enforce its own valid rules without first having to establish their validity before some superior official or tribunal (if one should exist)."[77]

Finally, at least in mature and stable legal systems, uncertainty about what a legal institution is will not in practice lead to much uncertainty about what the law is. For, in practice, there is a great deal of consensus about which institutions are legal institutions. (In immature or unstable legal systems, where there is uncertainty about what the legal institutions are, the Moral Impact Theory predicts that there will be uncertainty about what the law is.) It's also worth noting that, as Raz and Shapiro note, it is plausible that the features that distinguish a legal system (or institution) from other systems are a matter of degree.[78] Unsurprisingly, there will be borderline cases.

III. THE MORAL IMPACT THEORY AND LEGAL INTERPRETATION

The outline of the theory is now complete. In this Part, I examine the implications of the Moral Impact Theory for legal interpretation.[79] In Section A, I return to the example drawn from *Smith* to illustrate in greater detail the implications of the idea that legal interpretation involves working out the moral consequence of the relevant facts. In Section B, I look at the way in which the Moral Impact Theory explains the relevance to legal interpretation of factors other than actions of legal institutions, such as canons of construction. Finally, in Section C, I clarify and qualify the idea that legal interpretation may require developing an ambitious moral theory.

A. A Statutory Interpretation Example

Recall that, in *Smith*, the defendant offered to trade a gun for cocaine.[80] He

76. RAZ, *supra* note 37, at 150-54. Raz's analysis has a third condition: a legal system must be an open system. *Id.* at 152-54.

77. SHAPIRO, *supra* note 23, at 222.

78. *See* RAZ, *supra* note 37, at 150; SHAPIRO, *supra* note 23, at 223-24.

79. On my usage of the term *legal interpretation*, see *infra* note 100.

80. 508 U.S. 223 (1993). The discussion in this Section focuses on statutes. For elaboration on the way in which the Moral Impact Theory understands the impact of appellate decisions, *see supra* Section II.B.

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was convicted of drug trafficking crimes and sentenced under 18 U.S.C. § 924(c)(1), which provides for the imposition of augmented penalties if the defendant "during and in relation to any crime of violence or drug trafficking crime . . . uses . . . a firearm." The Supreme Court, over a vigorous dissent, held that trading a gun satisfied the statutory requirement and therefore affirmed Smith's conviction.

The Court's majority and dissenting opinions both regard the question as whether the statutory language—"uses . . . a firearm"—has the effect of making the specified penalty applicable to one who trades a firearm for drugs. The opinions appeal to diverse considerations in support of their opposing positions: the "ordinary meaning" of the word "use";[81] dictionary definitions of the word;[82] what people ordinarily mean by words or phrases in particular contexts or how words ordinarily are used;[83] how Congress intended the language to be construed;[84] how the statutory phrase is most reasonably read;[85] whether Congress would have wished its language to cover the situation;[86] whether Congress intended the type of transaction to receive augmented punishment;[87] the purpose of the statute;[88] how the word "used" is employed in the United States Sentencing Guidelines;[89] case law;[90] other provisions in

81. *Smith*, 508 U.S. at 228, 230; *id.* at 242-44 (Scalia, J., dissenting).

82. *Id.* at 229 (majority opinion).

83. *Id.* at 242, 245 (Scalia, J., dissenting). Justice Scalia seems to take his discussion of how words ordinarily are used to be an explication of their ordinary meaning. As I discuss in the text, however, his argument is better understood as getting at what people ordinarily mean when they use certain words or phrases (roughly, speaker's meaning as opposed to semantic content).

84. *Id.* at 229, 236.

85. *Id.* at 231.

86. *Id.* at 239.

87. *Id.* at 240. How is Congress's intention concerning which transactions are to receive augmented punishment different from Congress's intention concerning how the language is to be construed? The former is an intention concerning the ultimate legal impact of the statute; the latter, by contrast, is a linguistic intention. For a nice example of how the two can come apart, see the discussion of *Saadeh v. Farouki*, 107 F.3d 52 (D.C. Cir. 1997), in Greenberg, *Legislation as Communication?*, *supra* note 2, at 242-44.

88. *Smith*, 508 U.S. at 240.

89. *Id.* at 243 (Scalia, J., dissenting).

90. *Id.* at 233 (majority opinion).

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the same statutory scheme;[91] the history of the statute's modification over time;[92] and the rule of lenity.[93]

For all these claims about relevant considerations, the majority and dissenting opinions strikingly lack both an account of why the relied-upon considerations are relevant[94] and an account of how much weight each deserves—or, more generally, of how to adjudicate between the considerations when they point in different directions. These two points are closely related: without an understanding of why considerations are relevant in the first place, it is difficult to know how to reconcile conflicts between them.[95]

Recently, two philosophers of language, Stephen Neale and Scott Soames, have (separately) pointed out that the Court's opinions in *Smith* are marred by mistakes about language and communication.[96] Most significantly, the Justices seem unaware of the important distinction between the semantic content of a sentence (roughly, what is conventionally encoded in the words) and what a person means or intends to communicate on a particular occasion by uttering the sentence (and might be easily understood by ordinary hearers to so intend).[97] I will use the term *communicative content* for this latter notion. Soames and Neale share a central point: although the meaning of the word "use" certainly includes trading, Congress, by employing the sentence in question, may well have intended to communicate that the specified penalties cover only the use of a gun *as a weapon*.[98] Both assume without argument that

91. *Id.* at 233-35.

92. *Id.* at 246 (Scalia, J., dissenting).

93. *Id.* at 246-47 (Scalia, J., dissenting).

94. In some instances, the opinions appeal to past practice. *See id.* at 228, 233-35, 239-40 (majority opinion); *id.* at 241-42 (Scalia, J., dissenting). On why past practice cannot provide an adequate account, see *infra* note 102.

95. The majority and dissent do not even agree about which considerations are *relevant*. While the dissent appeals to the Sentencing Guidelines, the majority finds it "dubious . . . that the Sentencing Guidelines are relevant in the present context." *Id.* at 231. But neither side offers a reason for its position.

96. SCOTT SOAMES, *Interpreting Legal Texts: What Is, and What Is Not, Special About the Law*, *in* 1 PHILOSOPHICAL ESSAYS 403 (2008); Stephen Neale, Textualism with Intent 69-72 (Nov. 2008) (unpublished manuscript) (on file with author).

97. *See* SOAMES, *supra* note 96, at 412-14; Neale, *supra* note 96, at 26-36. The distinction derives from the seminal work of Paul Grice. PAUL GRICE, STUDIES IN THE WAY OF WORDS (1989). I am setting aside the further distinction between what is stated or asserted and what is merely implicated, as it is unnecessary to the present discussion.

98. SOAMES, *supra* note 96, at 414-15. The discussion of *Smith* in Neale's manuscript is incomplete, but it is clear from the rest of the manuscript (and personal conversations) that

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the law is determined by the communicative content of the statute, not its semantic content.[99]

Thus, despite all their sophistication about language, both philosophers are ultimately in the same position as the Court. They point to a plausibly relevant determinant of the content of the law—communicative content—that they favor, but they offer no framework for explaining why it is relevant or why it should trump other putative determinants.

As I now explain, the account of legal interpretation that derives from the Moral Impact Theory supplies what is missing.[100] First, it offers an account of the possible relevance of the diverse candidate factors mentioned by the Court's opinions, as well as the one favored by the philosophers of language. Second, this account of why factors are relevant yields an account of how potential conflicts between sources are to be resolved.

On the Moral Impact Theory, a statute's contribution to the content of the law is, roughly, the impact of the fact of the statute's enactment on the moral profile. In interpreting a statute, therefore, a fact is relevant because it has a bearing on the statute's impact on the moral profile. A fact might, for example,

this is Neale's central point. *See* Neale, *supra* note 96, at 70-72; *see also id.* at 26-27, 35-36, 49-50 & n.33, 60-62, 66-68.

99. *See* SOAMES, *supra* note 96. A caveat with respect to Neale. In a later version of his rich paper, he writes that the communicative content of a statute (his preferred term is *what a statute states*) "leaves wide open the question of the contribution it makes to the law," and concedes that the latter question goes "well beyond the philosophy of language." Neale, The Intentionalism of Textualism 5 (2009) (unpublished manuscript) (on file with author). Aside from this official disclaimer, however, Neale seems to assume throughout that the communicative content of a statute is its contribution to the law. Moreover, if the disclaimer were taken seriously, Neale's paper could not do what it purports to do. For example, his paper claims, on exclusively linguistic grounds, to dissolve the debate between textualists and intentionalists. But that debate concerns a statute's contribution to the content of the law, not merely its communicative content. For criticism of the communicative content theory of law held by Soames, Neale, and others, see Greenberg, *Legislation as Communication?*, *supra* note 2.

100. As I use the term, *legal interpretation* is the activity of working out the content of the law. *Statutory interpretation*, in particular, seeks to ascertain a statute's contribution to the content of the law. My usage contrasts with one according to which interpretation is the activity whose ultimate goal is to ascertain the linguistic content of the relevant legal texts. For this latter usage, see Lawrence Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013). Interpretation in my sense is also not to be equated with how courts should decide cases. For example, in deciding cases, courts should sometimes create new legal standards and should sometimes not enforce existing legal standards. See *infra* Section III.C for brief discussion of the distinction between determining what the law is and deciding cases.

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be relevant because it is a morally relevant aspect of the enactment of the statute (or evidence of such a morally relevant aspect) or because it is a background fact that affects the enactment's impact on the moral profile. In other words, moral considerations explain why various factors are relevant.

Considerations of democracy and fairness provide explanations of why the various factors mentioned by the Court in *Smith* are (or would plausibly be thought to be) relevant. For example, the relevance of how Congress intended the language to be construed, whether Congress would have wished its language to cover the situation, how the statutory phrase is most reasonably read, what Congress intended to communicate, and the purpose of the statute are all plausibly explained by democratic considerations. What about dictionary definitions and ordinary usage? Dictionary definitions and ordinary usage are plausibly evidence of how the statutory phrase is most reasonably read or what the legislature would have reasonably been understood to be intending to communicate. And considerations of both democracy and fairness arguably make those factors relevant. Similarly, fairness helps to explain the basis of the rule of lenity and the relevance of decisions of past cases (because of the importance of treating like cases alike).[101]

It is worth noting how natural it is to appeal to democracy, fairness, rule of law, and other moral values to provide such explanations.[102] For example,

101. On the rule of lenity, see Greenberg, *The Standard Picture*, *supra* note 2, at 76. On past decisions, see *supra* text accompanying note 62.

102. Two other main candidates for what could explain the relevance of various factors to statutory interpretation are linguistic considerations and established practice ("that's how we do things in this legal system"). With respect to the former, I have argued elsewhere that, though the study of language is helpful in clarifying and distinguishing the candidates for a statute's contribution to the content of the law, it lacks the resources to explain which of these candidates constitutes a statute's contribution to the law. *See* Greenberg, *Legislation as Communication?*, *supra* note 2.

With respect to past practice, notice first that it may itself be relevant for moral reasons. For example, if courts have in the past reliably interpreted statutes according to the semantic content of the text rather than what the legislature intended to communicate, then legislators and the public have reason to understand legislators to be voting on the semantic content, not on the communicative content. So there are democratic reasons for interpreting the statute in accordance with the past practice. Next, even if past practice can provide a reason for interpreting a statute in a particular way, it can't be the only reason. For one thing, it's familiar for judges and legal theorists to argue in favor of rejecting a particular well-established practice. Justice Scalia, for example, has famously argued (on democratic grounds) that legislative history deserves no weight in statutory interpretation. Such arguments would be incoherent if past practice were the only relevant consideration. For another thing, when past practice offers support for different ways of interpreting a statute,

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textualists often appeal to democratic values to support the view that the intentions of legislators or framers, to the extent that they are not expressed in the text, are not relevant to statutory or constitutional interpretation.[103] And, similarly, intentionalists argue that democracy supports their view that what matters is the legislators' intentions.[104]

The Moral Impact Theory offers not just an account of why various factors are relevant, but, more importantly, an account of how conflicts between relevant factors are to be resolved. On the Moral Impact Theory, the contribution of a statute to the content of the law will depend on the on-balance best resolution of conflicts between moral considerations. Morality provides answers to questions of how conflicts between competing considerations are to be resolved, for example, by determining how much weight competing considerations deserve. In this respect, it differs from a miscellaneous collection of considerations. If one asks what action is supported by, say, considerations of health, efficiency, and aesthetics, then, assuming that there is any conflict between the specified considerations, the question is incomplete because one has not specified how the considerations are to be weighed against each other. The Moral Impact Theory holds not merely that we are to take into account moral considerations, but also that we are to give to each consideration the relevance that morality in fact gives it. (I do not mean to suggest that morality always provides a unique answer to every practical question. There may be much indeterminacy.) Competing democratic considerations may, for example, have different implications for which aspects of the statute are relevant. Or considerations of democracy and considerations of fairness might point in different directions in a particular case. According to

as it frequently does in our legal system, it provides no help in resolving the conflicts. In *Smith*, for example, appeal to past practice does not resolve the issue. More fundamentally, I have proposed elsewhere that it is an essential feature of a theoretically interesting class of legal systems of which our legal system is a member – and perhaps of all legal systems – that there are always reasons why a particular aspect of the practice has the consequences that it does for the content of the law. The mere fact that things have been done a particular way in the past cannot by itself provide such a reason. *See* Greenberg, *How Facts Make Law*, *supra* note 2; Greenberg, *How Facts Make Law II*, *supra* note 2; Greenberg, *On Practices and the Law*, *supra* note 2.

103. *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17-18 (1997); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

104. *See, e.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW (1999).

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the Moral Impact Theory, the correct resolution of such conflicts depends on what the relevant moral values, on balance, support.

Again, we can illustrate with *Smith*. Here is a useful, if somewhat simplified, way of understanding the fundamental disagreement between the majority and the dissent. The majority believes, roughly speaking, that the interpretation of the statutory provision is determined by its semantic content. The dissent, though it does not understand the distinction between semantic content and communicative content, is groping for the position that the interpretation of the statute is determined by what Congress intended to communicate or perhaps by what one who had uttered the words of the statute would typically have intended.[105] As noted above, these positions, by themselves, offer no way forward. One side insists that the words of the statute, as written, straightforwardly cover using a gun to trade, and the other side argues that Congress probably used the words intending to communicate that using a gun *as a weapon* subjects a defendant to the specified sentence.

According to the Moral Impact Theory, in order to adjudicate between these positions, we need to develop the understandings of democracy (or other moral considerations) that would support these different positions and then determine which is the better understanding of democracy. One democratic consideration might support the idea that what matters is not the actual intentions of particular legislators, but only what is specifically encoded in the language that is voted on by the legislature. A different aspect of democracy might support giving decisive weight to the legislature's actual communicative intentions. Because, according to the Moral Impact Theory, the correct resolution of the conflict depends on the best understanding of all the relevant considerations, resolving the conflict requires developing an account of democracy.[106]

105. Soames suggests understanding the disagreement along essentially these lines. *See* SOAMES, *supra* note 96, at 412-15.

106. Accounts of statutory and constitutional interpretation that are grounded on moral considerations often assume that there is one candidate for a provision's contribution to the content of the law, whether it be original public meaning, communicative content, or something else, that is supported by moral considerations with respect to all statutory or all constitutional provisions. *See, e.g.*, sources cited *supra* notes 103-104. The Moral Impact Theory makes no such assumption. It may be that the relevant values point in different directions in the different circumstances of different statutory or constitutional provisions.

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B. The Relevance to Statutory Interpretation of Factors Other than Actions of Legal Institutions

I have mostly emphasized the way in which the Moral Impact Theory explains the relevance of actions of legal institutions. It is also worth noting that the Moral Impact Theory offers an approach to explaining the relevance of other factors to the content of the law. Various facts and circumstances can be relevant to the content of the law because they affect the way in which actions of legal institutions alter the moral profile. Customs, settled expectations or practices in a particular industry, actions of important non-legal actors, influential misunderstandings of statutes, and new technological developments can have moral implications and therefore can affect what is morally required as a result of a particular statute (or other legal institutional action). Customs, expectations, and the like may affect what fairness requires, which solution to a problem is most likely to be adopted by others, or how the public understands the problem a statute addresses. This kind of account can be used to analyze the relevance of diverse factors to the law. To take one example, on such an account, the relevance of foreign law to constitutional law would be determined by asking what bearing foreign law has on the Constitution's impact on the moral profile. Obviously, this schematic suggestion does not solve the problem, but it offers a framework for thinking about it.

The Supreme Court's famous decision in *Holy Trinity Church v. United States*[107] might be well understood as involving the relevance of background factors to the moral impact of legislation. A church contracted with a man who was not a U.S. citizen to bring him to the United States to serve as rector. The statute at issue stated that it was unlawful to make a contract to bring a foreigner to the United States "to perform labor or service of any kind in the United States." Although the Court conceded that the contract fell "within the letter" of the statutory provision,[108] it decided that the contract was not in fact prohibited.

The Court put great weight on the ground that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."[109] The Court characterized this factor as evidence of Congress's intentions.[110] On the Moral Impact Theory, Congress's intentions

107. 143 U.S. 457 (1892).

108. *Id.* at 458.

109. *Id.* at 465.

110. *Id.* at 465-72.

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might be relevant for democratic reasons. But in fact the religious values to which the Court appeals would be poor evidence of Congress's actual intentions, and, moreover, there are important democratic reasons why congressional intentions that are not made publicly available should not affect our obligations.

The Moral Impact Theory could explain, instead, that the Court took the importance of religious values to affect the impact of the statute on the moral profile. Roughly, the idea would be that the Court took there to be important moral reasons why religious organizations should not be restricted in the activity, central to their mission, of hiring clergy. These reasons prevented the statute from affecting the moral profile in the way that it otherwise would have. This understanding is of course consistent with the fact that a different, more specific statute could override those reasons.

A less dated example might make the point more clearly. Consider the canons of statutory construction that ambiguities are to be resolved in favor of Native Americans and veterans.[111] According to the Moral Impact Theory, these canons are ways of taking into account the United States's moral debts to Native Americans and veterans, respectively.[112] Any statute acts against the background of moral reasons flowing from those debts. Those reasons may be sufficient to nudge the impact of a statute on the moral profile. (Understanding the canons in question as taking into account pre-existing moral reasons might seem obvious. But most theories of law—notably, theories that presuppose the Standard Picture—either have difficulty explaining how pre-existing moral reasons could have such relevance to the content of the law or have to regard the canons as instructing courts how to make law, rather than how to work out a statute's contribution to the content of the law.)

Other canons and interpretive doctrines can be understood in similar ways. The rule of lenity and the doctrine of avoiding absurd results are obvious examples. The Moral Impact Theory also understands linguistic or textual canons as rules of thumb for working out the moral consequences of statutes. For example, considerations of democracy and fairness militate in favor of a

111. *See* Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); Henderson *ex rel.* Henderson v. Shinseki, 131 S. Ct. 1197, 1206 (2011) ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" (quoting King v. St. Vincent's Hosp., 502 U.S. 215, 220-21 n.9 (1991))).

112. Thanks to Ben Eidelson for suggesting the example of the canon concerning Native Americans.

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statute's contribution being publicly accessible. Many of the linguistic canons can be understood as implementing these moral considerations by tending to push a statute's contribution toward the way in which people would ordinarily understand the statute. Examples include: *expresio unius est exclusio alterius*; *ejusdem generis*; and *noscitur a sociis*.

I should add that I do not mean to endorse the Court's decision in *Holy Trinity* or particular canons of construction. My point is just to explicate the resources of the Moral Impact Theory for understanding the relevance of diverse factors to the content of the law.

C. Clarification of the Need for an Ambitious Moral Theory

I want to close this Part by clarifying and qualifying the idea that legal interpretation may require working out an account of what the relevant moral values, on balance, support. First, obviously, the Moral Impact Theory does not convert statutory interpretation into an algorithm—a mechanical procedure.[113] Working out the best account of the relevant moral considerations can be a complex task requiring difficult judgments. What the Moral Impact Theory does provide is an understanding of what makes it the case that the statute is to be interpreted in a particular way, given that different factors point in different directions. Specifically, the correct interpretation is correct because it specifies the impact of the statute on the moral profile. Thus, the Moral Impact Theory clarifies what the questions are, so that we are not reduced to listing factors that point in different directions. According to the Moral Impact Theory, the master question is what is morally required in light of the enactment of the statute, not what the statute's linguistic content is. With respect to any specific factor that might be thought relevant, the question is what relevance moral considerations give to that factor, as opposed to other factors.

Second, if it is conceded that, say, a particular democratic consideration can help to explain whether a particular aspect of a statute is relevant, there is a powerful argument that what ultimately matters is what all the relevant values, on balance, require. To begin with, it is very difficult to see how it could be

113. The fact that the theory does not convert statutory interpretation into a mechanical procedure is no objection to it. Indeed, it would raise serious doubts about the Moral Impact Theory if it purported to offer an algorithm for statutory interpretation. Below, I consider the objection that, because the Moral Impact Theory has the consequence that working out the content of the law requires moral reasoning, it makes it impossible for law to fulfill its settlement function. *See infra* Section IV.B.

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that a democratic consideration is *relevant* to a statutory interpretation question, but that in order to resolve that question, we don't need an account of what democratic values, on the best understanding, require. If it matters that a particular aspect of democracy favors one interpretation of a statute, how could it not matter that, on balance, democratic values favor a different interpretation? Similarly, if democratic values support a particular approach to interpreting statutes, how could it not be relevant that once we take into account fairness as well as democracy, a different approach is favored? In short, if moral considerations are relevant, then, to the extent that they conflict, it is difficult to see what could justify a stopping place short of what moral values, on balance, support.[114] This argument suggests that, if one denies the need for an account of what morality requires with respect to statutory interpretation, one must deny that, for instance, democratic considerations have any bearing on the proper approach to statutory interpretation.

Third, although the previous point suggests that an ambitious moral account might sometimes be needed because the relevant moral considerations conflict, I don't mean to suggest that *whenever* we have to work out what the law is, we have to work out a complete account of all the relevant moral considerations. In the run of cases, all of the plausible accounts of democracy, fairness, and so on favor the same outcome. Therefore, in order to resolve such cases, it is not necessary to turn to the underlying moral considerations. That is why most cases are easy cases. Even in difficult cases, it is only necessary to eliminate candidate accounts to the extent that they favor a different outcome in the case at hand.

Fourth, judges and other agents faced with an actual legal case operate under a range of practical and ethical constraints apart from what the content of the law dictates. For example, as in many areas of cognitive endeavor, because of shortages of time, memory, and so on, a second-best solution might

114. It is familiar to encounter arguments that, in a particular context, only certain moral considerations should be considered. But this type of argument rests on the claim that, in the context in question, it is morally better, on balance, not to take certain moral considerations into account. What is needed to block the argument in the text is, rather, an argument for not taking into account certain considerations, regardless of whether, on balance, it is better that they be taken into account. A different possible way to block the argument would be to find a proprietary legal justification for not taking into account moral considerations. It is conceivable that the nature of law itself might determine how statutory interpretation is to be carried out. In that case, however, no appeal to democracy or the like would be relevant. To block the argument, we would need a proprietary legal reason why, say, one aspect of democracy is relevant to statutory interpretation but other aspects of democracy are not.

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yield better results. That is, judges with limited time and capacities might well do better to follow relatively simple heuristics, rather than trying to work out explicitly the impact on the moral profile of all of the relevant actions. I want to set aside the important topic of how, all things considered, judges should decide cases. (Because of the kinds of constraints just mentioned, I take it that the content of the law is a very important, though by no means the only, determinant of how judges should decide cases.) The Moral Impact Theory is, rather, a theory of what determines the content of the law. I am using the examples of *Smith* and *Holy Trinity Church* to explicate the theory's implications for statutory interpretation, i.e., working out a statute's contribution to the content of the law, rather than its more indirect implications for how judges should ultimately decide cases.

Fifth, it is a mistake to assume that one must produce a rigorous theoretical solution to a problem in order reliably to generate accurate answers. For example, what to believe—how to form and update one's beliefs about the world—is widely believed to be a massively holistic problem. When deciding what to believe on a particular issue, there is in general no way in advance to rule out the possible relevance of anything that you know. But you would be stopped in your tracks if, on every issue that arises, you had to take into account everything that you already know before deciding what to believe. How to hive off a manageable set of relevant considerations is a deep problem in philosophy of mind and cognitive science.[115] Yet, in practice, humans are remarkably good at forming and updating their beliefs about the world quickly and reliably, without considering everything they know. The point is that people can be skilled in practice at producing answers to a problem, despite the fact that producing a full, rigorous derivation of the answers would be unmanageably difficult. (Moreover, we can be skilled at producing answers without knowing how we do it.) It is therefore a mistake to assume that, because the Moral Impact Theory holds that the content of the law depends on what the moral considerations, on balance, support, the Moral Impact Theory makes impossibly difficult the everyday task of working out what the law is. The 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 on the moral profile, typically without the need to consider moral considerations explicitly.

115. *See* JERRY FODOR, THE MIND DOESN'T WORK THAT WAY: THE SCOPE AND LIMITS OF COMPUTATIONAL PSYCHOLOGY 23-40 (2000).

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Finally, I do not mean to claim that there will always be a single best resolution of every conflict between relevant factors. The Moral Impact Theory has the consequence that, if there are competing candidates for a statute's contribution and the relevant considerations do not favor one candidate over the others, then the law is indeterminate between the competing candidates.

IV. OBJECTIONS

In this Part, I address two possible objections, one concerning the possibility of morally arbitrary and morally bad legal norms and one concerning the law's ability to settle disagreement.

A. Arbitrary and Evil Legal Norms

First, it might be thought that because my view holds that legal obligations are certain moral obligations, it cannot account for morally arbitrary and morally bad legal rules.

The worry about morally arbitrary legal rules is easy to address. The key point is that we need to distinguish between what morality requires ex ante—before the legal institutions act—and what it requires ex post—after the relevant actions of the legal institutions. Of course, it is not morally required ex ante to file one's tax return by April 15 as opposed to April 1 or any other day. But it may well be morally required to do so once a particular scheme with its particular arbitrary choices has been implemented, others are participating in it, and so forth.

With respect to morally bad legal norms, the same kinds of considerations are *part* of the answer. As emphasized above, as a result of legal institutional action, it can become morally obligatory to participate in a scheme that is seriously morally flawed or to follow a morally flawed rule. Although these sorts of considerations can explain much morally flawed law, they cannot explain truly evil legal norms. Because my theory holds that the law is a certain part of the moral profile, my theory has the consequence that the law can never include truly evil norms. Such norms can never be part of the moral profile.

Some readers will think that this consequence of my theory is a mark in the theory's favor. But others will think that this consequence is a mark against the theory because they think it is obvious that there are truly evil legal norms.

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For those in this latter camp, I want to make two points. First, recall the distinction between the two senses of "a law."[116] I emphasize that my theory does not deny that there are evil laws, where "laws" is used in the sense of *statutes or other authoritative legal texts*. It should be uncontroversial that there are bad statutes, ordinances, regulations, and so on. The issue is the much more theoretical one of what impact on the content of the law such statutes have—in particular, whether such statutes give rise to evil legal norms. So the Moral Impact Theory accepts that there is a clear sense in which there are evil laws.[117]

Second, I want to make a fairly banal methodological point. Ultimately, the way to determine whether there can be truly evil legal norms is not to consult English usage or even lawyers' intuitions. True theories often have counterintuitive consequences—a great deal of what we now think about the world and about human beings would once have been thought to be absurd. We have to evaluate how successful theories are on a wide range of criteria, and once we have decided in this holistic way which theory is most successful, we then have to accept whatever counterintuitive consequences that theory has (at least until a better theory comes along).[118]

B. Moral Disagreement

Another possible objection is that the role that the Moral Impact Theory gives to moral reasoning is incompatible with a fundamental function of law—that of settling disagreements and eliminating uncertainty. Human beings disagree frequently about practical matters, about what is to be done. Law is supposed to provide a mechanism for settling these disagreements.[119] If the Standard Picture were correct, the objection goes, then we would be able to see how law could serve this settlement function. But, the objection continues, working out the moral profile will typically be highly controversial. Therefore,

116. *See supra* Subsection II.A.3.

117. Thanks to Derek Parfit for helpful discussion on this point.

118. It is also worth noting that the content of the law in the United States may appear to fall further short of ideal justice than it actually does because of the judicial unenforcement of constitutional norms. *See* SAGER, *supra* note 57; Sager, *supra* note 28. For example, because of institutional concerns, courts do not invalidate some statutes that are in fact constitutionally invalid.

119. *See* LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMA OF LAW (2001).

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if figuring out what the law is involved working out the moral profile, then law would not serve its settlement function.

First, it is controversial what the functions of law are, or even whether law has functions, but let us grant for purposes of argument that settling disagreements is an important function of law. It is at least as plausible, however, that law also has other important functions, such as those of ensuring that government coercion is used only in accordance with past political decisions,[120] acting for the public good, and improving our moral situation.[121] Thus, in order to evaluate how well the law would do at fulfilling its plausible functions (if a particular theory of law were true), we need to consider more than just the settlement function. For example, very roughly, if the Moral Impact Theory, as opposed to the Standard Picture, is true, then the law will do better at generating norms that are supported by moral considerations and less well at yielding certainty. I have argued elsewhere that, in other respects, the Moral Impact Theory suggests that the law is defective less often than the Standard Picture suggests. For example, if the Moral Impact Theory is true, then we will not find that the law regularly requires people to do morally impermissible things, such as to punish people who do not deserve it.[122]

At any rate, how well law would perform various of its functions if a particular theory of law were true has only a highly indirect bearing on whether that theory of law *is* true. The law is surely less than perfect at fulfilling some of its functions. In particular, we know that statutes and appellate decisions often fail to end controversy and even spawn further litigation. That a theory of law predicts that the law would be highly effective at performing the settlement function does not tell us much about whether the theory is true. On the other hand, it would certainly be telling if a theory of law predicted that law would generally be unable to perform one of its functions.

Second, however, it is not true that, on the Moral Impact Theory, the law would not be able to serve the function of resolving moral disagreement. To begin with, a very important part of the way in which a legal system settles disagreement is by having a mechanism for generating specific orders (directed

120. *See* DWORKIN, LAW'S EMPIRE, *supra* note 28, at 93.

121. Seana Shiffrin has argued that law has a function of morally educating citizens and developing their moral capacities. *See* Seana Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010). If law has such a function, then the need to engage in moral reasoning to work out the content of the law actually enables the law to better fulfill one of its functions.

122. *See* Greenberg, *The Standard Picture*, *supra* note 2, at 96-104.

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at particular individuals) that are backed up with force. We know from our own legal system that the content of the law is often highly controversial. As just noted, the enactment of a statute does not simply end disagreement. Specific orders directed at individuals are required in order to end disagreement in a peaceful way. As argued above, there are powerful moral reasons to give binding force to such specific orders of a government that has de facto authority. The Moral Impact Theory thus encounters no difficulty accounting for this central way of settling disagreement.

Moreover, it is false that the dependence of law on morality entails that the law cannot help to resolve disagreement and increase certainty about what is to be done. The enactment of a statute or other actions by legal institutions often change the circumstances in ways that make it much easier to determine what is obligatory.

There is a spectrum of different kinds of cases. At one end of the spectrum, there are highly controversial issues such as the permissibility of abortion or whether we should have a flat tax or a progressive tax. Even after the legal system takes action, for example by the legislature's enacting legislation, controversy is likely to continue. Even in such cases, however, the legislature's action may well change the circumstances in a way that makes it *less* controversial what is required ex post. Many who think that a flat tax would be more just than a progressive tax ex ante will recognize that once the legislature has acted, participation in the progressive tax scheme may become morally obligatory. Moreover, as noted above, the fact that action by the legal system often does not end controversy is exactly what we find in our legal system, so the fact that the Moral Impact Theory predicts such continuing controversy is actually a mark in its favor. Again, the way in which the legal system ends controversy when necessary is not to make more law but to direct a particularized order at a specific person.

It is important to recognize, however, that most issues are not like this. At the opposite end of the spectrum from issues on which controversy is unlikely to be settled even after extensive legislation and litigation, there are issues on which action by legal institutions can easily make the relevant part of the moral profile uncontroversial. Before the legislature enacts a statute specifying that cars must drive on the right side of the road, it is difficult to determine which side one should drive on, and there may well be no right answer. Once the legislature makes the right side salient and provides all kinds of mechanisms for enforcement, it is obvious that one should drive on that side.

Between the two ends of the spectrum are cases in which legal institutions can take action that clarifies what is morally required, even if it does not render it utterly uncontroversial. As the examples in Part II illustrated, legal institutions have a range of tools for making it more determinate and certain

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what morality requires.[123] Consequently, it is often easier to work out how the legal institutions have affected the moral profile than to work out the ex ante content of morality. Moreover, ordinary citizens can consult experts—also known as lawyers—in working out the impact of the legal institutions on the moral profile. As suggested above, legal interpretation skills, such as those of reading statutes and cases, may be reliable methods of working out the impact of actions of legal institutions on the moral profile—typically without the need to consider moral considerations explicitly. In sum, the Moral Impact Theory is consistent with law's having the ability to help settle disagreement about what is to be done.

CONCLUSION

According to the Moral Impact Theory, the content of the law is that part of the moral profile that obtains in virtue of certain actions of legal institutions. In conclusion, it is worth emphasizing how simple and natural the theory is. On the face of it, law-creating institutions try to create binding obligations. The Moral Impact Theory takes this datum seriously, maintaining that legal obligations are the genuine obligations that the legal institutions succeed in creating. As noted in the Introduction, the Moral Impact Theory also makes it easier to understand our abiding concern with law than do the two dominant views of law, the Standard Picture and the Dworkinian view.

I hope that I have also given a feel for the point of legal institutions' changing the moral profile, thereby creating legal norms. By changing the relevant circumstances, legal institutions can improve the moral situation in a variety of ways—for example by simplifying, clarifying, and making determinate our obligations. Consider again the example of the tax scheme. There is a pre-existing problem, and, consequently, important moral reasons to help to solve it. But those pre-existing moral reasons do not determinately and clearly support one particular solution. The legal system is able to channel the pre-existing moral reasons toward a particular solution. The legal system's action of publishing a particular scheme, setting up implementing mechanisms, and making others' participation likely changes the morally relevant circumstances.

My theory contrasts sharply with the Standard Picture, on which legal institutions make pronouncements, thereby automatically generating legal

123. *See supra* text accompanying notes 51-62.

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norms that correspond to the contents of the pronouncements. On the Moral Impact Theory, the legislative enactment of a statute may often have roughly the net effect of adding to the content of the law a norm that is more or less captured by the linguistic content of the legislation. But, when it does so, the explanation will be that the enactment of the statute changed the relevant circumstances, thus changing what people are morally required or permitted to do—not that the legal norm obtains simply because it was authoritatively pronounced.

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