

# Law's Argumentative Structure Belies the New "Moral Impact" Theory of Law

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**ABSTRACT:** The new Moral Impact Theory ("MIT") of law is novel, innovative, and influential. It claims that the moral impacts of legal institutional actions, rather than the linguistic content of any "rules" or pronouncements, determine law's content. MIT's corollary is thereby that the practice of legal interpretation consists in the inquiry into what is morally required as a consequence of the lawmaking actions. This paper challenges MIT by critiquing its attendant view of the nature of legal interpretation and argument. First, it is not practicable to predicate law's content on the ability of legal officials to resolve moral controversies. Second, it would be impermissibly uncharitable to claim that participants in the legal system commit widespread error in rejecting a moral argument as a focus of legal interpretation. Third, MIT ultimately rests on a confusion between two levels of thought, the intuitive and the critical, the latter being the deliberative level at which moral and legal thinking diverge. Fourth, because no two cases are precisely alike, and owing to the open texture of natural language, extra-jurisdictional "persuasive" and "secondary" authority permeates legal argument; yet, nearly by definition, such writing cannot have engendered significant moral impacts in the home jurisdiction. Fifth, one way or another, we arrive at linguistic contents.

**KEYWORDS:** Dworkin, Hart, jurisprudence, legal philosophy, legal theory, Mark Greenberg, moral philosophy, Richard Hare

## Introduction

The decades-long centerpiece of legal philosophy is known as the "Hart-Dworkin" debate, and concerns the relation between legality and morality. Herbert Hart maintained that law and morality are "firmly" separate (Hart 1958, 614), albeit later allowing for the *possible* inclusion of moral tests of legality (Hart 2012, 258). Ronald Dworkin, in opposition, saw legal decision making as resting on the search for morally appropriate principles that legal officials must take into account (Dworkin 1978, 26). Recently, the legal theorist Mark Greenberg has delved into what he believes to be an even more fundamental issue for legal philosophy, promising an "alternative" to the "two main views of law that have dominated legal thought" (Greenberg 2014, 1290).

Greenberg's launch pad is the fairly simple insight that the actions of legal institutions change facts and circumstances that are often morally relevant to our decision making. Such actions change our moral obligations by affecting our expectations, as well as our options, projects, and the conditions under which we interact. But his compelling thesis goes a step further, and claims that "the law *is the moral impact* of the relevant actions of legal institutions" (*id.*) (adding emphasis). Under this view, which Greenberg styles the "Moral Impact" Theory ("MIT"), the practice of legal interpretation consist in the inquiry into "what *is morally required* as a consequence of the lawmaking actions" (*id.*, 1303) (adding emphasis). Greenberg's view is that, regardless of how practitioners may theorize their own practice, what they actually do is to argue for legal interpretations that do "not correspond" to the linguistic content of the texts they hold out as supporting their claims.

This paper critiques MIT by challenging its tenet that reckoning moral impacts must be legal argument's defining task. Because MIT's consequent assumption about law's argumentative structure is untenable, its main thesis must fall. Five points follow: First, it is not practicable to predicate law's content on the ability of legal officials to resolve moral controversies. Second, it would be impermissibly uncharitable to claim that participants in the legal system commit widespread error in rejecting moral argument as a focus of legal interpretation. Third, MIT ultimately rests on a confusion between two levels of thought, the intuitive and the critical, the latter being the deliberative level at which moral and legal thinking diverge. Fourth, because no two cases are precisely alike, and owing to the open texture of natural language, extra-jurisdictional "persuasive" and "secondary" authority

permeates legal argument; yet, nearly by definition, such writing cannot have engendered significant moral impacts in the home jurisdiction. Fifth, one way or another, we arrive at linguistic contents.

### **The Epistemological Objection**

Although MIT does not necessarily ask practitioners or legal officials to do anything differently, simply interpreting their practice in a new way, the Theory implicitly claims a special epistemic task, vantage point, and expertise on behalf of those legal actors, each of which defies practical reality. Hence, *if accepted*, MIT could not help but have normative implications for legal practice, and place a strain upon the sort of argumentative discourse in which legal actors engage.

Legal officials and institutions neither have, nor are expected to have, the training or competence to decide “what is morally required.” Yet Greenberg contends that legal practice consists in “the on-balance best resolution of conflicts between moral considerations” (Greenberg 2014, 1330-31). Read one way, he interestingly bypasses the epistemological tension by staking out, as his underlying premise, the view that “a legal system, by its nature, is supposed to change the moral system for the better” (*id.*, 1322). Begging the question, he thereby claims as “intuitively clear” that an obligation motivated by animus or bent on morally iniquitous ends “is not a legal obligation, despite the fact that it is the result of actions of legal institutions” (*id.*). The problem is that, quite the contrary, it is intuitively clear, it seems, that such obligations *are* legal but not moral.

Yet, for MIT, actions by legal institutions that denigrate the moral system do *not* generate legal obligations. Those types of legal institutional actions will, at best, change the “moral profile”—being the range of obligations, powers, privileges, and so on—“paradoxically,” by generating moral obligations to “remedy, oppose, or otherwise mitigate the consequences of the action . . . (*id.*)” This, however, is for Greenberg a “defective” way of generating obligations, and not legally proper.

But which legal outcomes, or statutory or regulatory enactments, improve the moral system and which are deleterious? Is any particular action by a legal institution for the better or for the worse? These are the very questions that parties, litigants, interest groups and legislators vigorously debate. Law and classics Professor James Boyd White suggested that law may be distinguished from other institutions by virtue of “its central moment, the legal hearing,” at which one version of its language is tested against another (White 1987, 1963). The losers at any stage of the game believe that they have reasons to challenge the institution’s outcomes, and there is always opportunity to do so. But if law’s content is determined by moral impacts and moral obligations, demarcated between the genuine and the defective, with the justified impulse to alter outcomes signifying defect, and if legal institutional practice, via its argumentative structures, is on constant track “to remedy, oppose, or otherwise mitigate” the institutional status quo, then a legal system’s normal and proper functioning is at once legally proper and defective.

The paradox just suggested is that, under MIT (or so it seems), if the system is not working as it should then it is defective, and if the system is working as it should then it is also defective. The very act of reckoning moral impacts in relation to the legal obligations that follow threatens a sort of Buridan’s dilemma, wherein the moral agent is stuck midway between two interpretations. This is because any particular action occurring in the legal system may be described as leading simultaneously to moral improvement, at least from one point of view, and to morally deleterious impact, at least from another. But legal officials and subjects act continually, and tweak the law daily, perhaps suggesting that they are not, in reality, engaged in any such reckoning.

There are even more complex epistemic problems lurking. Whereas MIT rests on practical, first-order normative assessments, the road to assembling the sort of “moral profile” underlying MIT, and to assigning normative values to certain actions and circumstances, suggests the need for a prior, higher-order examination of where those principles come from and what they mean. If law is constituted by moral impacts, and if law’s interpretive mission is to resolve conflicts between competing first order moral considerations, then it should seem reasonable to try to settle on a shared view of morality at the outset.

Michael Smith has articulated the generally received view that “we should begin our study of ethics by focusing on meta-ethics, not normative ethics. For we cannot hope to do normative ethics without first knowing what the standards of correct argument in normative ethics are, and it is in meta-ethics that we discover those standards” (Smith 1994, 14). But once we begin to look at MIT from the meta-ethical point of view, additional conundrums arise that are simply foreign to legal analysis and to theoretical jurisprudence.

Under the Theory, when the legal institution acts, this alters the morally relevant background circumstances, and generates corresponding moral obligations. Discerning those obligations requires moral judgment. Writing from the Kantian perspective, Barbara Herman explains that actions altering the moral agent’s circumstances present the agent with “a deliberative problem whose resolution leaves her obliged to act as deliberation directs” (Herman 1996, 177). Yet institutionalizing any such deliberative problem presupposes some recognition of the standards or criteria upon which we deliberate.

Hence, once law’s content is defined to consist in the moral impacts of the actions of legal institutions, litigants, jurists and scholars are motivated to engage in prolonged meta-ethical discourse and dispute and, indeed, may be obligated to do so. Which theory of morality, in other words, should we adopt before even reaching the question of what moral impacts have resulted from legal institutional action? That sort of second-order deliberation, however, is both well beyond the practice of legal officials and would require that practitioners and jurists “reconsider seriously the methods by which they reach and justify their decisions” (Albartz 2014, xi).

### **The Error Theory Objection**

Greenberg’s is an argument from law’s content, as a conceptual matter, to moral deliberation and disagreement. He states that “debates over legal interpretation can only be resolved, in the end, by addressing the fundamental issue of how the content of the law is determined” (Greenberg 2016, 22). Having defined law’s content as the moral impact of legal institutional action, he views the interpreter, being the legal official or practitioner, as assessing the moral impacts of the legal data, texts, and activities, and then engaging in a moral deliberative exercise weighing competing considerations that arise from conflicting interpretations.

Greenberg purports to find strong evidentiary support for MIT in “the way in which lawyers, judges, and law practitioners work out what the law is [in] actual practice . . .” (Greenberg 2011, 72). Hence, if Greenberg’s depiction of the role and nature of legal interpretation does not comport with actual legal practice, this, too, should pose a significant problem for MIT.

The error theory objection to MIT requires both application of a convention and empirical substantiation. The empirical factor resides in showing that, in fact, jurists and legal practitioners do not take their argumentative or interpretive practice to center on moral deliberation. This may be a different issue from the one Greenberg addresses when he says that “practitioners are notoriously bad at theorizing their own practice” (Greenberg 2011, 72). We might agree that practitioners are not best suited for determining the conceptual content of law, or for determining how to determine this. Inquiring what legal actors believe themselves to be arguing about, however, is a different matter. As with speakers’ linguistic intuitions, which are quite “discriminating” (Fitzgerald 2010, 135), legal practitioners’ intuitions provide fairly sound theoretical data concerning the sort of argument in which they themselves are engaging. There does not seem to be a theoretical impediment to concluding that legal officials’ linguistic participation in law’s argumentative structure, and their beliefs about what general category of argument they are engaging in, clarify the logic of their practice and the meaning of their speech acts.

The convention just suggested concerns how, in building our concept of law, we go about treating the legal practitioner’s intuitions regarding her own practice. As John Mackie, the preeminent error theorist within moral philosophy, acknowledged, skepticism about an ordinarily held view “needs argument to support it against ‘common sense’” (Mackie 1977, 49). Short of adequate argument, we assume, as Kenneth Einar Himma put it, “that legal practitioners cannot be systematically mistaken about the nature of the core practices of law” (Himma 2013, 154).

It is unclear whether Greenberg's error theorizing extends so far as to oppose the precept just stated, which Himma has derived from Joseph Raz's writings. In any event, though, if it is the case that practitioners do not in the main take themselves to be debating morals when engaged in (or by) legal argument, or if they even go so far, typically, as to affirmatively shun moral claims, then the view that they are mistaken and that law's argumentative structure is nonetheless morality-laden needs argument. Greenberg has not really offered *such* an argument.

But whether that is, in fact, the widespread view of legal officials or other practitioners is an empirical matter, not resolved here. For now, we rest on what *appears*, in the data, to be legal officials' typical reaction to overtly moral claims. It seems that judges deciding cases are not overly receptive to such claims, and that they seldom claim moral superiority for the legal doctrines they apply. In contract law, for instance, courts hold that "moral obligations do not give rise to contractual liability" (*Steele*, 130 F. Supp.2d 23, 31). In tort law, mere moral responsibility does not give rise to legal liability (*e.g.*, *Petrosky*, 284 Ga.App. 354, 359). Moral obligation—arising from official state conduct or otherwise—does not impart a legal duty, nor does a moral lapse signify a breach of duty (*e.g.*, *R.J. Reynolds Tobacco*, 96 So.2d 917, 920-21). Judges even show disdain for moral argument, deeming this to indicate the lack of a compelling *legal* position (*e.g.*, *Manwill*, 361 P.2d 177, 178). Courts have said, "A mere moral consideration is nothing" (*Musick*, 76 Mo. 624, 626).

### **The Two-Levels Objection**

Yet Greenberg discerns in actual legal practice an argumentative structure within which conflicts between moral considerations are resolved. We should try to explain where Greenberg goes wrong. The moral philosopher Richard Hare has offered an astute critique of moral thinking gone awry that may well be quite helpful. Hare's thesis was that a great deal of confusion had vexed both theoretical ethics and practical moral thinking as a result of neglect of the distinction between the two levels at which moral thought occurs (Hare 1981, 25).

The two-level system begins with the general, *prima facie* principles that we intuitively summon when confronted by some morally challenging circumstance. Relatively simple moral principles are necessary but not sufficient for solving many moral problems that arise in new or more complex situations. For one thing, the new situation will often require some sort of conciliation, a weighing and balancing of conflicting *prima facie* principles (*id.*, 39). Commitment to keeping one's promises, for example, sometimes gives way to later-arising and morally weighty demands to attend to someone in need.

The non-intuitive kind of moral thinking, at which conflicts and difficult scenarios are resolved upon deliberation, happens at the level of critical thinking. Being moral, both levels of thought give rise to universal prescriptions. However, thinking at the critical level is often highly particularized, and Hare indeed distinguishes principles generated in critical thinking as being capable of "unlimited specificity" (*id.*, 41). Critical moral thinking not only adjudicates between competing general principles by, for example, picking out which differences between those *prima facie* principles are relevant to the moral choice, but also selects our *prima facie* principles in the first instance. For purposes of this discussion, we shall bracket the third, meta-ethical level of moral thinking.

Now why do we surmise that, like certain moral views critiqued by Hare, MIT likely rests on a confusion that arises from a failure to disambiguate between the intuitive and critical levels of thinking? No one would seriously doubt that the actions of legal institutions have moral impacts. With regard to the nature of those impacts, Greenberg confines his analysis to legal officials, because (1) ordinary citizens "do not have a general moral obligation to do what the legislature or other legal institutions command," and, in contrast, (2) "the legal system *can* typically generate moral obligations of government officials" (Greenberg 2014, 1318).

Then, however, legal systems are not easily distinguished from other institutional arrangements. This is because actions taken on the part of any institution will likely impact the moral profile of officials *within that institution*. Hence, there is an equivocation in MIT arising from the competing needs (1) to localize institutional moral impacts to the set of individuals for which these impacts create true obligations, namely legal officials, and (2) to broaden the impacts to the set of individuals

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

A theory of law that identifies law's content with morals must grapple with the inevitable generation of moral disagreement when cases and controversies arise. For Hare, the mechanism, or procedure, used in the legal system for resolving controversies is precisely the apparatus that separates law from morality (Hare 1981, 151). In a significant way, Greenberg appears to stick to the intuitive level of moral thinking in his view of how law resolves controversy. The state intervenes with a decision backed by force, one intuition prevailing over another.

In actual practice, when the court receives the case, it has first impressions. These are not necessarily momentary, but might endure and influence the court's attitude toward the issues and litigants. The judge's opening impressions are probably comprised, in significant part, by moral intuitions, understandably being experientially prior to reflection and analysis. These intuitions might arise, in varying degrees, from the judge's sensing of the moral impacts of prior decisions or statutes in relation to the new situation. It is also likely that prudential institutional intuitions are present at the outset.

Beyond the quick intuitive level, however, legal decision making grapples with the issues at the ponderous critical level. But it is at this level that legal thinking, and law's argumentative structure, takes on distinct features, different from those that characterize critical moral thinking. Critical thinking occurring within law's argumentative structure is specialized, and rarely expressed in moral terms or by virtue of appeals to moral sentiments or to the need for universalizable remedial principles, and the like. Hart suggested, for instance, that legal deliberation asks whether "a person's case falls under the rule" (Hart 2012, 88), which can be deemed a non-moral inquiry implicating standards for determining what was intended and with what level of specificity. Hence, judges in actual cases, as seen above, eschew the parties' "merely" moral claims. And, in contrast to the universal prescriptions of unlimited specificity derived, at least in Hare's model, from critical moral thinking, legal outcomes are presumed not universally prescriptive, but rather locally binding, however highly coveted are inter-jurisdictional consistency and uniformity.

### **The Persuasive Authority Objection**

In arguing toward local outcomes, however, legal practitioners recognize, and indeed depend on the truism, that the new situation is not quite like the prior one. Even when the circumstances are similar, one side will have an interest in claiming that it is not "covered by" prior pronouncements, exploiting the open-textured nature of natural language. Theoretical disagreements will arise about the standards for determining the extent to which the existing legal materials—prior decisions, enactments, and so forth—point the way ahead.

Under MIT, the law is the moral impact of prior institutional actions, not a matter of what the legal texts say on their face or even what they mean in pragmatic contextual terms. It may matter, as one consideration out of many, whether the prior institutional communicative acts frame the present controversy. But the prior and existing linguistic data is neither the law nor directly explanatory of what the law requires.

The corollary to the perception that existing "binding" or "controlling" precedents within the jurisdiction do not well enough "fit" the current controversy—as one side or the other will typically claim—is that extra-jurisdictional authorities should provide guidance. Frederick Schauer, for example, has noted "the ubiquitous references to persuasive authority" in legal texts (Schauer 2008, 1943). The same is true of "secondary" authority, such as treatises or other professional literature.

Widespread reliance upon persuasive and secondary authority in legal argument is not solely an empirical matter, but also rests on an institutional logic. Absent persuasive authority or other outside influence, it may be difficult to explain how institutions evolve. To the degree that the newly acknowledged institutional need, or the newly commenced controversy, is different from the last, so

the influence of practical intra-jurisdictional authority wanes and theoretical extra-jurisdictional sources are “ubiquitously” summoned.

Because, seen this way, extra-institutional actions become a significant guiding authority for decision making, the argumentative focus cannot readily be on the moral impacts of prior institutional action. This is not to preclude a policy inquiry into what moral impacts we may now want to create. Receptiveness to extra-legal or extra-jurisdictional inputs, however, does not align with a moral impacts theory of law’s content, or with non-positivist theory generally. Hence, MIT’s credibility is significantly hampered by the widespread occurrence in adjudication of argument about the persuasiveness of extra-jurisdictional and secondary authority. Nearly by definition, such authority cannot have engendered significant moral impacts in the home jurisdiction.

### **The Linguistic Necessity Objection**

Finally, it seems that a moral impact theory such as Greenberg’s, which claims that “the linguistic content of pronouncements (decisions, etc.) has no special status” (Greenberg 2011, 59), is ultimately self-defeating.

Motivating MIT is the salient need to translate legal institutional actions and pronouncements into legal obligations, powers, privileges, and so on, these constituting law’s content. For Greenberg, the received understanding does not adequately make this move, because it presupposes that legal pronouncements *directly* and linguistically communicate obligations, rather than explaining how this happens. Although Greenberg theorizes in favor of a moral impacts view, he does not meet his burden in offering convincing argument against the widely held understanding that legal institutional speech acts constitute law’s content, simply by virtue of their representing what the law is in their performative legislative and judicial utterances. The underlying logic—which does seem to paraphrase, however technically, the common understanding of legal content—is that institutional facts “require linguistic or symbolic modes of representation or they cannot exist” (Searle 2006, 65).

But what ultimately self-defeats MIT is a bit different. A legal system realizes its institutional mission—including resolving disputes, creating and manipulating norms, conveying powers and permissions—to the extent that participants and community members are both capable of understanding what is expected of them and collectively recognized as carrying those role assignments. Recognition of obligation, however, presupposes the concept of an obligation, which is conveyed linguistically. The obligations themselves derive from legal institutional action that represents those obligations as existing. Whether now or later, obligation is imposed when it is capable of being recognized, and that occurs when it is conveyed linguistically.

### **Conclusion**

There is a disconnect between what legal institutions pronounce one day and what is required the next. Articulating a theory of moral impact, Greenberg innovatively attempts to bridge that explanatory gap between pronouncement and obligation, separating the latter from the linguistic content of the former. Law’s argumentative structure, however, suggests a contest that is both tightly bound to the linguistic content of legal pronouncements, and concerned with the non-moral issue of the extent to which the prior pronouncement fits with, and covers, the new situation.

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