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“Legal Interpretation and Natural Law”

Lecture by
Mark Greenberg, University of California, Los Angeles

Speaker:
Mark Greenberg, UCLA Law School and Philosophy Department

Commentators:
Michael Baur, Fordham Philosophy Department
Benjamin Zipursky, Fordham Law School

CLE Reading Materials


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Panel 1: Legal Interpretation and Natural Law

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Greenberg, Mark. *Principles of Legal Interpretation.*

Mark Greenberg is Professor of Law and Professor of Philosophy at UCLA. His areas of expertise include philosophy of law, philosophy of mind and psychology, and criminal law. He is co-director of the UCLA Law and Philosophy Program.

Greenberg received his law degree from the University of California, Berkeley and served as law clerk to the Hon. Ruth Bader Ginsburg on the U.S. Court of Appeals for the D.C. Circuit. He was a Marshall Scholar at Magdalen College, Oxford and earned both his B.Phil. and D.Phil. in philosophy from the University of Oxford.

Before coming to UCLA, Greenberg taught at Princeton University and the University of Oxford. He has been a Junior Research Fellow at Jesus College, Oxford, a Fulbright Scholar at the University of Stockholm, and a Harrington Fellow at the University of Texas at Austin.

Greenberg also served as Deputy Assistant Attorney General in the U.S. Department of Justice, where his work focused on criminal law and policy, constitutional law (especially equal protection and First Amendment issues), and appellate litigation. In addition, he worked as a federal prosecutor.

Greenberg has written numerous articles and book chapters in philosophy of mind and philosophy of law. His article “How Facts Make Law” won the American Philosophical Association’s 2007 Berger Memorial Prize.
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.

**Author.** Professor of Law and Associate Professor of Philosophy, UCLA; Faculty Co-Director, UCLA Law and Philosophy Program. For valuable discussions and comments on this paper or ancestors of it, I would like to thank Larry Alexander, Selim Berker, Mitch Berman, Jules Coleman, Ronald Dworkin, Les Green, Barbara Herman, Scott Hershovitz, Pamela Hieronymi, Ken Himma, Kinch Hoekstra, A.J. Julius, Frances Kamm, Sean Kelsey, Christine Korsgaard, Brian Leiter, Harry Litman, Andrei Marmor, Herb Morris, Steven Munzer, Derek Parfit, Stephen Perry, David Plunkett, Joseph Raz, Larry Sager, Scott Shapiro, Seana Shiffrin, Scott Soames, Larry Solum, Nicos Stavropoulos, and Jeremy Waldron. I am especially grateful to Andrea Ashworth, Seana Shiffrin, and Scott Shapiro for many invaluable conversations. Special thanks to Ben Eidelson and other editors of the *Yale Law Journal* for helpful suggestions.
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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.
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. 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. This account is assumed without argument by both the majority and dissenting opinions in Smith. 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
linguistic content. 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.

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. 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. 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.

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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.
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
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.
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

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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.
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


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
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. One reason is that it dovetails with—and indeed fills a gap in—legal positivism, the most widely held position in philosophy of law. A central positivist thesis is that the content of the law

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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
depends, at the most fundamental level, only on social facts, understood as non-normative, non-evaluative facts. 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. 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. 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
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. 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.

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).

The second main view is that of Ronald Dworkin, which, though well-known and influential, is far less widely accepted than the Standard Picture. 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 justify past legal and political practices. This reason for this is the role of “meta-interpretation” in constituting the content of the plans. See id. at 331-87.


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.


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
famously explicated the relevant kind of moral justification with his notions of fit and justification.\footnote{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.}
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.\(^3\)

**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.

<table>
<thead>
<tr>
<th>Principles</th>
<th>Legal Actions</th>
<th>Resulting Moral Obligations</th>
</tr>
</thead>
<tbody>
<tr>
<td>The content of the law according to Dworkin</td>
<td>The content of the law according to the Moral Impact Theory</td>
<td></td>
</tr>
</tbody>
</table>

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 Impact Theory, there are serious difficulties with the relevant notion of moral justification.

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.

\(^3\) 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.
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.
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. 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.  

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.


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
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. 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

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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. 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. 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.

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.
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. 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.
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.
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:

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.
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. 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. 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. 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. 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.
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.
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.
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).
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. For example, there are familiar ways in which legislatures fail to be accountable to the public.

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.)
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-

59. See id. at 84-102.
existing, relatively open-ended, moral obligations into a moral obligation to pay a specified amount of money into that scheme.\textsuperscript{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.\textsuperscript{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

\textsuperscript{60} See \textit{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.

\textsuperscript{61} See infra Section IV.B.
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

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

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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.
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

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\(^{67}\) 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.
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
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.\textsuperscript{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.\textsuperscript{73} Although it is not the goal of the Moral Impact Theory, 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-legal institutions are less central to the theory than they are in standard legal theories.

\textsuperscript{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.

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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.\textsuperscript{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 \textit{Legality}.\textsuperscript{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.

\textsuperscript{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 \textsuperscript{72}, may also yield a necessary condition on a legal institution.

\textsuperscript{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.” \textit{Id.} at 216-17. On my view, such representations are only one determinant of what law is for or is supposed to do.
behavior and by their claiming to be supreme.\textsuperscript{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).”\textsuperscript{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.\textsuperscript{78} Unsurprisingly, there will be borderline cases.

\section*{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.\textsuperscript{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.

\subsection*{A. A Statutory Interpretation Example}

Recall that, in Smith, the defendant offered to trade a gun for cocaine.\textsuperscript{80} He

\begin{itemize}
\item \textsuperscript{76} Raz, supra note 37, at 150–54. Raz’s analysis has a third condition: a legal system must be an open system. \textit{Id.} at 152–54.
\item \textsuperscript{77} Shapiro, supra note 23, at 222.
\item \textsuperscript{78} See Raz, supra note 37, at 150; Shapiro, supra note 23, at 223–24.
\item \textsuperscript{79} On my usage of the term legal interpretation, see infra note 100.
\item \textsuperscript{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.
\end{itemize}
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”; dictionary definitions of the word; what people ordinarily mean by words or phrases in particular contexts or how words ordinarily are used; how Congress intended the language to be construed; how the statutory phrase is most reasonably read; whether Congress would have wished its language to cover the situation; whether Congress intended the type of transaction to receive augmented punishment; the purpose of the statute; how the word “used” is employed in the United States Sentencing Guidelines; case law; 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).
the same statutory scheme; the history of the statute’s modification over time; and the rule of lenity.

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 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.

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. 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). 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. Both assume without argument that

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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.
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
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,

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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.
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,

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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,
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. And, similarly, intentionalists argue that democracy supports their view that what matters is the legislators’ intentions.

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.


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.
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 States107 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.
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. 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. 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

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.
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. 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

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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.
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.
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
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.
For those in this latter camp, I want to make two points. First, recall the distinction between the two senses of “a law.” 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.

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).

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. 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,

\[\text{\footnotesize 16. See supra Subsection II.A.3.}\]
\[\text{\footnotesize 17. Thanks to Derek Parfit for helpful discussion on this point.}\]
\[\text{\footnotesize 18. It is also worth noting that the content of the law in the United States may appear to fall further short of ideal justice than it actually does because of the judicial unenforcement of constitutional norms. See SAGER, supra note 57; Sager, supra note 28. For example, because of institutional concerns, courts do not invalidate some statutes that are in fact constitutionally invalid.}\]
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, acting for the public good, and improving our moral situation. 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.

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.
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
what morality requires. 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 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

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123. See supra text accompanying notes 51-62.
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.
Principles of Legal Interpretation

Mark Greenberg, UCLA

1. Introduction

In the large literature on legal interpretation, we find intelligent argument and sophisticated theoretical resources. But the field lacks system or structure – there is no general understanding of what constraints a theory of legal interpretation must meet or what it must accomplish in order to be successful. Theorists enter the debate from different starting points, offering a particular consideration or type of argument in favor of a preferred account. Some theorists argue from a particular conception of legislative supremacy, democracy, or legitimacy. Others maintain that the study of language yields the correct method of legal interpretation. Still others offer an assortment of different “modes” of interpretation. A common approach is to offer normative considerations, such as the appropriate role of appointed judges in a democracy, for favoring a particular method of interpretation. Another tack is to insist that given what interpretation is, legal interpretation can only be the ascertainment of the legislature’s intentions. Are such diverse approaches in competition? Could an account based on a conception of legislative supremacy, linguistic considerations, or the nature of interpretation accomplish the tasks facing an account of legal interpretation? We lack a framework for evaluating such questions.

The present paper seeks to address this problem of structure. The goal is to argue from difficult-to-dispute starting points to a set of fundamental principles that constrain any account of
legal interpretation. I do not advocate a particular theory or method of legal interpretation. Rather, I derive principles that any tenable theory of legal interpretation must adhere to.

Here is the plan for the rest of the paper. Section 2 argues that we should understand legal interpretation to be the process of using legal materials to ascertain the content of the law. Section 3, the centerpiece of my argument, considers the relation between the epistemology and the metaphysics of law — that is, between how to ascertain the content of the law and how the content of the law is determined. I argue that a theory of legal interpretation is (in a sense that I elucidate) responsible to a theory of how the content of the law is determined. Section 4 responds to three objections, thus sharpening my position on the relation between the epistemology and the metaphysics of law. Section 5 responds to the objection that legal interpretation should be concerned with second-best, rather than ideal, theory. Sections 6 through 8 introduce three further principles that theories of legal interpretation must satisfy. Section 9 argues that my central principle — concerning the relation between a theory of legal interpretation and a theory of law — is more difficult to satisfy than might initially appear because the most widely-held theory of law is inconsistent with any controversial theory of legal interpretation. Section 10 examines the implications of my principles for representative theories of legal interpretation.

2. Legal interpretation as discovering the law

The Starting Point: Legal interpretation is the process or activity of using legal materials to ascertain what the law is, or, more precisely, to ascertain legal obligations, powers, rights, privileges, and so on.
My starting point is that legal interpretation is the process or activity of using legal materials, such as statutes, constitutions, contracts, wills, and the like, to ascertain legal obligations, powers, rights, privileges, and so on. (In practice, of course, we look at some relatively small subset of legal materials in order to answer some particular question.)

That legal interpretation seeks to discover legal obligations (powers, rights, and so on) is partly intended to be a useful regimentation of ordinary usage. When lawyers and judges interpret statutes, regulations, contracts, wills, they are normally trying to determine what legal obligations there are. Conversely, when a judge makes a discretionary decision, such as determining a criminal sentence that is not specified by sentencing guidelines, or engages in fact-finding, we don’t describe the judge’s decision-making process as legal interpretation.

That’s not to say that nothing else ever gets mixed in under the term ‘legal interpretation.’ Courts engage in a range of activities that are not always carefully distinguished from ascertaining what the law is. These activities include fashioning decision rules, finding a way to decide a case that is not covered by applicable law, creating law, deciding whether enforcing the law goes beyond the court’s institutional capabilities, and so on. I don’t want to dispute that such activities, typically together with ascertaining what the law is, are sometimes included under the rubric of legal interpretation. But to the extent that it is clear that a court is doing

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1 It would be simpler to say that legal interpretation is the process of using legal materials to discover what the law is, but this formulation would be awkward in the case of contracts, wills, and other private law instruments. My focus will be on interpretation of statutes and constitutions, so I will often use the simple formulation and talk of discovering what the law is. The discussion is for the most part applicable to the interpretation of private law instruments as well.

2 On the distinction between decision rules and the content of the law, see Berman XXX.

3 A few qualifications. First, it is worth noting that, at least on orthodox views of the relation between law and morality, there are separate legal and moral questions of how to decide a case that is not covered by applicable law. Second, as I mention in the text below, it may be that, when there is no applicable first-order legal standard, there is a legally correct way for a judge to proceed. Third, I do not include in the list in the text activities unlikely to be confused with ascertaining what the law is, such as fact-finding and deciding whether it is morally required to disregard applicable law.
something other than ascertaining the law, e.g., finding a way to decide a case that is not covered by applicable law, that rubric seems inappropriate.

One important clarification: when I say that a case is not covered by applicable law, I mean that there are at least two outcomes that the applicable first-order legal norms do not rule out. But many other outcomes may be excluded by those norms. Thus, that a case is not covered by applicable law is consistent with existing legal norms strongly constraining the legally permissible outcomes. Moreover, even if the applicable first-order legal standards do not resolve the case, it may be that there is a legally correct way for a judge to proceed. For example, there may be rules of closure – e.g., if there is no first-order legal standard that gives the plaintiff a right to win, decide the case in favor of the defendant. More interestingly, it may be that there are legal requirements on how a judge should go about creating law when necessary to resolve the case. For example, it might be that when a statutory scheme leaves a specific question unresolved, the judge is legally required to create law interstitially in the way that best implements the principles embodied in the statutory scheme or in the way that the legislature would have resolved it had it considered the issue. In other words, a legal system might have second-order legal norms governing how to resolve cases that are not resolved by first-order legal norms. Again, when I say that a case is not covered by applicable law, I mean only that first-order legal norms do not dictate a unique resolution.

With respect to the activities of lawyers, as opposed to judges, there are fewer candidates for other activities that might be classified as legal interpretation. Lawyers don’t create law, fashion decision rules, and so on. One relevant activity that lawyers engage in is predicting what courts or other authorities will do. They often make such predictions, however, precisely by working out what the law is, and, in that case, it is no surprise that the term legal interpretation is
apt. In some cases, however, lawyers predict what the authorities will do based on their personal familiarity with the relevant officials, on political considerations, or the like. And here the term ‘legal interpretation’ again seems inappropriate.

Ascertaining the law is obviously governed by different principles than activities such as creating law or finding a way to decide a case that is not governed by existing law. It is an activity with a different aim; consequently, different means are suited to it. It is therefore important to distinguish ascertaining the law from other activities that courts and lawyers engage in. Given that ‘legal interpretation’ centrally picks out working out what the law is, it seems an apt regimentation to use the term exclusively for that activity.

Thus far, I’ve been suggesting that taking legal interpretation to be a search for the content of the law is a useful precisification of ordinary usage. But I want to make a stronger claim: that the theories I discuss and criticize – for example, theories commonly labeled “originalism,” “textualism,” “intentionalism,” “purposivism,” “non-originalism,” “pluralism,” and “living constitutionalism” – are in fact best understood as trying to ascertain the law. (I will continue to refer to such theories as theories of legal interpretation, but I don’t mean to beg any questions by this usage; it is just a shorthand for such theories.) To the extent that these theories were engaged in some other project, my criticisms would not be apt. Thus, my claim that legal interpretation seeks to ascertain the law is primarily a claim about what project the theories in question are engaged in, rather than a claim about the use of the term “legal interpretation”.

I believe that I am on strong ground in claiming that theories of legal interpretation seek to ascertain how statutory and constitutional provisions and other legal instruments affect the content of the law. Some theories are more or less explicit about this point. In others, the point is implicit. To see this, notice, first, that theorists of legal interpretation would be in broad
agreement that courts are in general bound to follow the law when there is law on the issue before them. (I say “in general” because it is plausible that it is sometimes permissible for courts to sometimes underenforce legal requirements.\(^4\) But this issue is not relevant here. When theorists of legal interpretation give their preferred accounts, they certainly are not offering accounts of when courts should underenforce the law.) Moreover, the theorists in question take their accounts to yield outputs that are, at least as a rule, decisive – that is, they are supposed to resolve legal cases. Consequently, the accounts cannot be well understood as seeking to ascertain some factor that merely bears on what the content of the law is, for example the linguistic meaning of the texts. Given the consensus that courts are generally bound to follow the law and the assumption that the accounts yield decisive resolutions, the accounts must either be accounts of how to ascertain the law or accounts of how to decide cases when there is no law.

There are at least three reasons for thinking that theorists are not best understood as addressing how courts should decide cases when there is no law. First, before a court can reach the question of how to decide a case when there is no law, the court must begin by trying to ascertain the law. Thus, a theory of how to decide a case when there is no law could only be relevant after a theory of how to ascertain what the law is. But theorists of legal interpretation take their theories to provide a starting point as well as a decisive answer to cases.

Second, the theories in question tend to be focused on the details of texts, legislative history, and the like. This focus makes sense if the goal is to figure out what the law is. But if the goal is to decide a case where there is no law, it is more difficult to explain the attention to

\(^4\) See Sager XXX. In at least many such cases, it is arguable that in deciding to underenforce the law, courts are following higher-level legal standards, e.g., ones concerning what courts should do when they are institutionally ill-suited to enforcing constitutional obligations. To the extent that this is correct, the statement that judges are bound to follow the law when there is law on the issue before them is true without qualification (though misleading because it might suggest that judges must always follow first-order legal standards).
the details of statutory texts and so on; and there are lots of other relevant considerations, such as the societal consequences that we would expect to receive more consideration. Moreover, the appeals to legislative supremacy, the nature of authority, the limited role of judges in a democracy, what interpreters are seeking when they try to understand linguistic utterances, and so on wouldn’t really make sense if the goal were to figure out how to decide cases when there is no law.

Third, many theorists of legal interpretation strenuously insist that there is one uniquely correct way to interpret statutes and other legal texts. If the project were how to decide cases when there is no applicable law, one would expect the tone to be very different – one would expect a much more tentative, open-ended type of inquiry. In sum, despite some confusion in the literature, theories of legal interpretation are best understood as theories of how to ascertain what the law is.^[5]

Larry Solum has advocated using the term “legal interpretation” for the activity of working out the linguistic meaning of the legal texts, as opposed to the content of the law.^[6] His

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5 The points in the last two paragraphs are less strong to the extent that there are second-order norms about how to decide cases in the absence of law that require close attention to the details of legal materials and dictate unique outcomes. But it is implausible that the U.S. legal system has such norms as a general matter.

6 Solum proposes using "constitutional interpretation" for the activity of working out the linguistic meaning of the constitutional text and "constitutional construction" for the activity of working out the impact of the Constitution on the law. His main concern is to prevent conflation between linguistic meaning and what the law is. He and I share the view that it is extremely important to prevent this conflation. So our difference on this point is largely terminological. Solum appeals to the long-standing use of the interpretation/construction distinction, but on my reading of that history, it does not support his terminology. It is true that some writers gloss “interpretation” as discovering “meaning,” but such remarks must be understood in light of the extremely common conflation of discovering meaning with discovering a provision's contribution to the content of the law. Once this point is taken into account, the traditional distinction is better characterized by saying that interpretation involves working out a provision's contribution to the law, while construction is a more creative process of creating law that takes over when a provision's contribution to the law is indeterminate or uncertain on the issue before the court. See Whittington 1999.

In my view, using "legal interpretation" for finding linguistic meaning is more likely to promote the conflation than using “legal interpretation” exclusively for finding the content of the law. Moreover, we don't need a technical term for the process of working out the linguistic content of legal texts, any more than we need a special term for working out the linguistic content of any text. Rather, we need to be careful to use different terms for, on
usage actually brings out how natural it is to use the term in my way. On Solum’s view, once legal interpretation is completed, we don’t yet know what the law is. We have to begin a separate process of using the ordinary linguistic meanings of the texts along with other legally relevant considerations to work out what the law is.

By contrast, legal interpretation as it is ordinarily understood is supposed to yield a take on what the law is, not an intermediate step from which one can go on to work out what the law is. It would be peculiar for an appellate opinion to arrive at a legal interpretation of the relevant provisions and then to begin a discussion of how to get from that interpretation to a conclusion about what the law is. Two observations support this point about ordinary usage. Legal interpretation, on the ordinary understanding, draws on considerations that are not relevant to ordinary linguistic meaning. For example, the rule of lenity in criminal law seems to have its basis in considerations of fairness. Such canons are sometimes rationalized as heuristic devices for inferring what the legislature meant or communicated, but they don’t look much like sincere attempts to infer the legislature’s communicative intentions. Similarly, if legal interpretation were just a matter of working out the linguistic meaning of the texts, it would not require special skills beyond those of competent speakers of the language (and in some cases technical linguistic skills), though it might require knowledge of specialized vocabulary or knowledge of relevant

the one hand, the impact of an enactment on the content of the law and, on the other hand, linguistic contents, such as semantic content, speaker's meaning, communicative content, and implicatures. Moreover, Solum's usage has other unfortunate side effects. It tends to suggest that there is only one linguistic meaning. As argued in section 7, it is important that theories of legal interpretation distinguish different types of linguistic meaning. Second, Solum's usage tends to slant the playing field in favor of views that, like his own, claim that the relation between linguistic meaning and the content of the law is relatively simple. Specifically, the two-stage picture goes well with a view like Solum's on which the linguistic meaning of the texts becomes the law either without modification or, if necessary, with some filling in or precisification. It obviously does not fit well with a view like that of Ronald Dworkin or my own on which there is no simple route from linguistic meaning to the content of the law and on which linguistic meaning has no privileged status. Dworkin, Law's Empire; Greenberg, “The Moral Impact Theory,” Yale Law Journal (2014).
background considerations. In fact, however, legal interpretation draws on lawyerly reasoning skills that are learned in law school.

It is worth emphasizing that the question of legal interpretation addressed here is not the question of how judges should decide cases. First, the question of legal interpretation is not specific to judges or to any other particular actor. Anyone, including a private citizen or a theorist, can seek to discover the law. Second, as pointed out above, in deciding cases, judges have tasks that go beyond figuring out what the law is, such as deciding how to decide cases where there is no binding legal standard, creating law, and deciding whether legal requirements should be underenforced.

3. The need for an account of legal interpretation to be linked to a theory of law

The Linkage Principle: Any account of legal interpretation is responsible to a theory of law, i.e., a theory of how the determinants of the content of the law make legal propositions true.

From our starting point that legal interpretation seeks to ascertain what the law is, our first fundamental principle follows: that an account of legal interpretation is responsible to a theory of law. I will first address what I mean by a theory of law and then turn to my claim that an account of legal interpretation must be responsible to such a theory.

Facts about the content of the law – for example, the fact that, under California law, contracts for the sale of land are not valid unless committed to writing – are not among the most

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7 The reason for the qualification about technical linguistic skills is that, although ordinary speakers are proficient at inferring, for example, speaker meaning, there are more esoteric types of linguistic meaning such as semantic content. See section 7. But the skills necessary to identify such contents are not taught in law school.

8 A third reason is that, as I discuss below, I largely set aside considerations of bounded rationality that may have an important bearing on how judges should decide cases. See section 5.
basic facts of the universe. Rather, such legal content facts – legal facts, for short – obtain in virtue of other, more basic facts. A core project in philosophy of law is that of giving what I will call a theory of law – an account of how the content of the law is determined at the most fundamental level. For example, on H.L.A. Hart’s positivist theory, the content of the law is determined at the fundamental level by convergent practices of judges and other officials – what Hart calls the rule of recognition.9 By contrast, on Ronald Dworkin’s “law as integrity,” theory, the content of the law is determined, roughly speaking, by the set of principles that best fit and justify the legal practices. Yet another view would be that the content of the law is determined by, say, the linguistic meaning of the authoritative legal texts.10

To say that a theory of law specifies how the content of the law is determined at the fundamental level is to say that there is no further determinant that makes it the case that the content of the law is determined in that way. For example, if Hartian positivism is true,11 it is not that there are, say, moral reasons in virtue of which the convergent practice of judges is what matters. Rather, the most basic explanation of why statutes, judicial decisions, and the like have the impact that they do on the content of the law is that judges have a practice of treating those items as having that impact.12 Similarly, if the content of the law is determined at the

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9 For brevity, I will usually write "the fundamental level" rather than "the most fundamental level."
10 In Greenberg (forthcoming), I argue that this "Standard Picture" is most plausibly understood as an account of how the content of the law is determined at the surface level, not the fundamental level.
11 It is not necessary to add the qualification that Hartian positivism is true at the fundamental level because it is built into Hartian positivism that it is a theory of how the content of the law is determined at the fundamental level.
12 There is a deep question concerning what kind of philosophical explanation, if any, there can be of why the content of the law is determined, at the fundamental level, in the way that it is. Such an explanation would have to appeal to factors that are not themselves determinants of the content of the law. For example, assuming that Hartian positivism is true, suppose that a putative explanation appeals to a certain factor – factor X – to explain why the practice of judges is the fundamental determinant of the content of the law. Factor X could not be a determinant of the content of the law, for, if it were, it would be more fundamental than the practice of judges. I hope to address the question raised in this paragraph elsewhere, but for present purposes I set it aside. I will assume throughout that the kinds of explanations that I am discussing of how the content of the law is determined are ones that appeal to determinants of the content of the law. There can be no explanation of this sort of why the content of the law is determined, at the fundamental level, in the way that it is.
fundamental level by, say, the plain meaning of the authoritative texts, then it is not that the plain meaning of those texts matters because of the practice of judges, reasons of democracy, or anything else.

The distinction between the fundamental level and less basic levels should be familiar from discussions of inclusive legal positivism. Inclusive and exclusive legal positivists agree that, at the fundamental level, moral facts play no role. But inclusive positivists, unlike exclusive legal positivists, maintain that moral facts may play a role in determining the content of the law at a less basic level, for the rule of recognition may give that role to moral facts.\(^\text{13}\)

As inclusive legal positivism illustrates, that the content of the law is determined in a particular way at the fundamental level is consistent with its being determined in a different way at the surface level of ordinary practice.\(^\text{14}\) We can use Hartian positivism to illustrate the point more generally. If Hartian positivism is correct, then the way in which the law is determined at the surface level will depend on the actual practice of judges in the particular legal system. If the practice of judges is, say, to treat the semantic content of an authoritative legal text as its contribution to the content of the law, then, at the surface level, the content of the law will be determined by the semantic content of the authoritative legal texts.\(^\text{15}\) We could make parallel points with respect to other theories of how the content of the law is determined at the fundamental level.\(^\text{16}\)

\(^{13}\) See Hart 1994: 250-54.
\(^{14}\) There could be intermediate levels between the fundamental level and the surface level, but I will set aside this complication, as it should not affect my argument.
\(^{15}\) Semantic content is, roughly speaking, the information conventionally encoded in the linguistic expressions. In non-technical terms, the semantic content of a sentence is approximately its literal meaning. See section 7 below.
\(^{16}\) To say that the content of the law is determined in a particular way, whether at the surface level or the fundamental level, is not to make a claim about the actual practice of judges or other practitioners, such as a claim about how they in fact go about ascertaining what the content of the law is. Rather, it is to say what it is in virtue of which the legal facts obtain. A claim about how the content of the law is determined therefore has a closer bearing
Having clarified the notion of a theory of law, I turn to my argument that a theory of legal interpretation has to be appropriately linked to a theory of law. In general, an account of how to figure out the properties of particular Xs must be appropriately based on what Xs are. An astronomer can use a radio telescope to tell us about cosmic bodies because the bodies that she is studying give off radiation that can be picked up by the radio telescope. The astronomer’s method for inferring facts about the cosmic bodies from the data provided by the instruments is closely linked to a theory of the bodies themselves, what they are made of and how they behave. The fact that using a particular instrument – a barometer, say – for learning about stars would have some virtue, e.g. that it would be inexpensive or would save the astronomer’s eyes – could not be a good reason for using the instrument unless what it measures is appropriately related to the stars. To use a sports analogy, if one wants to learn how to keep track of the score in an unfamiliar sport, one needs to understand what the determinants of the score are, e.g., how the actions of the players make it the case that a point is scored.

The general point should be uncontroversial. A method for learning about something has to be appropriately geared to the target of study. We can use vision to learn about physical objects because they reflect light. We can’t use vision to learn about numbers (except indirectly by looking at symbols) because they do not. In philosophical terms, the epistemology of a domain has to be appropriately linked to the metaphysics of that domain. (By the “epistemology” of a domain, I will mean how we learn about the facts of that domain. By the

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17 For arguments in a similar vein, see Scott Shapiro 2010: 25-30; Greenberg 2011. My arguments focus on the claim that a theory of legal interpretation must be linked to a theory of how the content of the law is determined at the fundamental level, but similar points apply even more strongly to the connection between a theory of legal interpretation and an account of how the content of the law is determined at the surface level.
“metaphysics” of a (non-basic) domain, I mean how the facts of the domain are determined or constituted by more basic facts.

Indeed, on a flat-footed line of thought, one might think that there is little or no space between a theory of how to detect the facts of some target domain and a theory of how the facts about domain – the X facts – are (metaphysically) determined. Suppose that the X facts are determined by more basic A facts, B facts, and C facts. To put it schematically, let’s say that the X facts are a particular function Θ of those facts -- Θ (A,B,C). On the flat-footed line of thought, then, the best theory of how to detect the X facts is simply that we must detect the A, B, and C facts and calculate Θ (A, B, C). To take a simple, concrete example, consider M1, a standard measure of the money supply. Suppose we want to know what M1 is in the United States at a particular time. Money supply facts are not basic facts about the universe. So we need to know the more basic facts that determine M1. M1 is the sum of currency on hand plus demand deposits (roughly, checking accounts). Thus, in order to figure out what M1 is, we need to figure out the total quantities of currency on hand and demand deposits and then add them together. (Similar points could be made about how to figure out the total quantities of currency on hand and demand deposits.)

Matters are not quite this simple, however.

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18 There is a special case in which we have an X-fact detector that makes it unnecessary for us for us to consciously identify the A, B, and C facts and calculate Θ – or even to be aware of how the X facts are determined. I discuss this kind of case – in which we have a reliable way of detecting the target facts without knowing anything about the metaphysics – below XXX.

19 I defer discussion of two complications. First, some metaphysical differences do not make a difference to epistemology. Second, in some domains, we have methods of ascertaining the facts that we have reason to believe are reliable, even if we know little about the underlying metaphysics. In section 4, I argue that neither of these complications is relevant to legal interpretation.
First, an account of how to ascertain the facts must be sensitive to evidentiary considerations. Suppose, for example, that, on the correct theory of law, a statute's contribution to the content of the law is the content of the legislature's communicative intention in enacting the statute. We know from the study of language that the standard way of inferring communicative intentions relies on context. In that case, the best theory of legal interpretation may direct us to use context in interpreting statutes. But context plays no role in making the content of the law what it is; for the legislature's communicative intentions are not what they are in virtue of the context. Context is just a means of inferring communicative intentions.

A theory of legal interpretation might also include evidentiary restrictions of a different sort. It might be that there are legal or moral reasons – as opposed to reasons of accuracy – not to permit consulting certain kinds of evidence. For example, it might be that, for democratic reasons, private diaries of legislators are not appropriate kinds of evidence, even if consulting them would yield more accurate conclusions about the content of the law. 20

Next, at least on one way of thinking about epistemology, epistemology depends not only on the facts to be detected, but also on the abilities and limitations of the creatures in question. An account of how to find out about cosmology for creatures with sensory apparatus sensitive to neutrinos, magnetic fields, and x-rays would be very different from an account designed for human beings. Human beings have to, for example, build neutrino telescopes, and make inferences from the readings on the instruments. Similarly, an epistemology for humans should

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20 On one line of thought, this kind of point should really be implemented at the level of metaphysics rather than epistemology. According to this way of thinking, if democratic reasons preclude the consultation of certain sources, then the content of the law does not depend on whatever is in the sources. I think that it is a possibility, however, that the content of the law might depend on certain facts, yet there are legal or moral reasons why it is not appropriate for a court to consider certain kinds of evidence of those facts, even though they are reliable sources of those facts. Nothing will turn on this point, however.
take into account their bounded rationality. For example, if we are interested in how soldiers in combat should figure out where the enemy is located, we must take into account the effects of fear, lack of sleep, time pressure, and the like.

Turning to legal interpretation, certain kinds of evidentiary restrictions illustrate the point. Suppose that the content of the law depends on the communicative intentions of legislators. Given widespread human biases and tendencies, it might be that looking at certain kinds of evidence of those communicative intentions would tend to produce worse outcomes — that is, ones that are less accurate about the content of the law — than excluding those kinds of evidence.

These points about taking into account the abilities and limitations of specific kinds of creatures do not change the basic point that an account of how to figure out the X facts — where X facts are high-level facts of some sort — must depend on how the X facts are constituted by more basic facts. Whatever the abilities and limitations of the creatures in question, the best method of figuring out the X facts depends on how the X facts are constituted. To return to the example on which the X facts are a specific function of A, B, and C facts, we may need an additional layer of theory to take into account how the specific abilities and limitations of the relevant creatures affect the best way for them to figure out the A, B, and C facts (and to calculate the relevant function). But the ultimate goal is to figure out the A, B, and C facts (and calculate the function); thus, the metaphysics of the X facts plays a crucial role in determining which method of discovering the X facts is best. Whatever the specific capacities of the relevant creatures, the fact that the X facts are constituted by (a specific function of) the A, B, and C facts is an essential part of what makes a theory of how to figure out the X facts true.
In the case of legal interpretation, our concern will be with legal interpretation for human beings, not for other possible creatures. We can therefore set aside questions about how creatures with other kinds of perceptual or cognitive faculties might go about ascertaining the law. There are special issues about how, say, children, people without legal education, or people with cognitive impairments should best go about ascertaining the law. For example, in many circumstances, people without legal education should simply consult a legal expert, rather than trying to ascertain the law directly. Similarly, in certain situations, personal involvement is likely to impair one’s ability to ascertain the law, so people who have a direct stake in a matter might be advised to consult a disinterested legal expert. I set aside such issues, instead simply assuming that our concern is with intelligent, cognitively normal adult humans who have been trained as lawyers (and are not personally interested in the issue at stake).

Even with this qualification, bounded rationality raises important issues for a theory of legal interpretation.\textsuperscript{21} Judges, to take an especially important group, operate with limited time and limited information and they are subject to human cognitive biases and other limitations much discussed in recent literature. It would be important for a theory of legal interpretation aimed specifically at judges to take such considerations into account. We might also want to have special accounts for other participants in the legal system, for example, for legislators, executive officials, and police officers.

Let’s distinguish between, on the one hand, an ideal theory of legal interpretation, which specifies how an intelligent, legally trained human being works out what the law is – without taking into account bounded rationality and, on the other hand, a second-best theory of legal

\textsuperscript{21} See Greenberg 2014 1335-1336.
interpretation that takes into account bounded rationality. For reasons that I discuss in section 5, I will for the most part focus on ideal theory. From this point on, I will set aside considerations of bounded rationality, especially circumstances that are specific to particular types of actors, such as judges or police officers, and will use ‘a theory of legal interpretation’ to refer to ideal theory in the sense just identified.

With these clarifications out of the way, we can now ask: what exactly is the nature of the relevant link between the epistemology of law and the metaphysics of law – between a theory of legal interpretation and the way in which the content of the law is determined? First, a theory of interpretation presupposes a theory of law. If a theory of legal interpretation is true, it is true primarily because of 1) the way in which the content of the law is determined at the fundamental level and 2) any factors or circumstances that the fundamental level makes relevant. If it is true that we should interpret statutes in accordance with, say, their communicative content, it is true either because a statute’s communicative content is the fundamental determinant of its contribution to the content of the law or, more likely, because the fundamental determinant of the content of the law, perhaps the convergent practice of judges, makes it the case that a statute’s communicative content is its contribution. (Actually, there is another possibility – that a statute’s communicative content is the best evidence of its contribution to the content of the law. But if that is true, it is again because of the fundamental determinants of the content of the law and any factors that those determinants make relevant.) In a nutshell, a theory of legal interpretation is ultimately made true by the way in which the content of the law is determined at the fundamental level along with factors that are made relevant by the fundamental determinants. Therefore, a

\[\text{22 The reason for the qualification "primarily" is that peripheral factors, such as considerations of what evidence may appropriately be considered, may also play a role.}\]
theory of legal interpretation presupposes a theory of law in the sense that the truth of a theory of legal interpretation requires that an appropriate theory of law be true.

A consequence is that a theory of legal interpretation is responsible to a theory of law. What does this responsibility involve as a concrete matter? A minimal implication is that a theory of legal interpretation must be consistent with a coherent and plausible theory of law. For example, some accounts of legal interpretation claim that interpreters should draw on an assortment of modalities or factors.\(^{23}\) It a serious question what plausible theory of law could make true such an unstructured multifactorial interpretive process.\(^{24}\) If there is no plausible theory of law that could make a theory of legal interpretation true, then the theory of legal interpretation must be rejected.

Another implication of the responsibility of a theory of legal interpretation to a theory of law is that the commitments of the theory must be consistent with the theory of law that is presupposed. There are various kinds of inconsistency. Many theorists of legal interpretation, if pressed on the question of their underlying theory of law, would appeal to Hartian positivism, as it is the most widely held theory of law. As I argue in section 9, however, Hartian positivism is in fact inconsistent with any controversial theory of legal interpretation. Now, in some cases, a theorist’s appeal to Hartian positivism is doing no work, and the theorist could simply abandon that appeal. In other cases, however, theorists explicitly or implicitly rely on the assumption that Hartian positivism is true in defending a controversial theory of legal interpretation.

Similarly, in developing and defending theories of legal interpretation, theorists regularly make arguments that seem to presuppose conflicting theories of law. Many theorists seem to

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\(^{23}\) See Bobbitt 1991; Breyer 2005.

\(^{24}\) See Berman and Toh 2013.
assume that the contribution of a constitutional or statutory provision is constituted by its linguistic meaning and that this fact is not dependent on normative factors. In refining their theories – for example in seeking to avoid awkward implications – the same theorists appeal to normative factors, for example to reasons of democracy, legitimacy, or rule of law. As I discuss below, for example, Scott Soames argues on linguistic grounds that the content of the law is determined by what the legislature asserts. Moral values play no role. He also argues, however, that linguistic meaning should not control when it yields a result that is inconsistent with “the chief publicly stated purpose that proponents of the law advanced to justify it.”

Presumably, this position could be defended on grounds of democracy. But what coherent and plausible theory of law could support such a combination of positions about legal interpretation? If moral values are not part of what makes it the case that linguistic meaning constitutes a statute’s contribution, then how can moral values be relevant to override the role of linguistic meaning?

Another kind of inconsistency involves appeal to apparently ad hoc considerations. The central tenets of a theory of interpretation may seem to presuppose a particular theory of law. But the theory of interpretation also includes wrinkles that are not warranted in light of that theory of law. For example, Scalia and Garner (2012) seem to presuppose that a statute’s contribution is the linguistic meaning of the text. They then go on to endorse various kinds of interpretative canons that are not well designed to discover linguistic meaning, but more plausibly serve judicial policies or other goals.

An especially common kind of ad hoc argument involves appeal to a consideration sounding in democratic values, legitimacy, or rule of law, without considering other arguments.

25 Soames 2013.
based on the same values or considering other values. Contemporary textualists, for example, often gesture toward an argument from democracy. But if an argument from democracy is relevant, it is difficult to see how it could be warranted to stop short of asking what democratic values support all things considered. If one democratic reason militates in favor of public meaning, but other democratic reasons outweigh that reason, it would be hard to argue that respecting public meaning is justified on democratic grounds. Similarly, if reasons of fairness and rule of law in favor of public meaning are outweighed by democratic values, it would be hard to claim on fairness grounds that respecting public meaning is justified on balance. Consequently, once one takes normative factors to be relevant, it is difficult to avoid the view that the determinants of the content of the law depend on all relevant normative factors. Therefore, there is at least a prima facie difficulty for a position that appeals to one normative argument, without considering others.

In light of these points, it would be a good practice for theorists of legal interpretation to say explicitly which theory – or at least which general type of theory – of law they presuppose. Doing so would impose a salutary discipline on theories of legal interpretation, combating the problematic tendencies described above. For example, theorists who indicated a commitment to a theory of law would presumably be less likely to offer arguments that seem to presuppose inconsistent theories of law or to offer ad hoc arguments, ones not grounded in the relevant theory of law. Critics would be in a better position to evaluate a theory of interpretation that was linked to a theory of law, for they would not be left guessing about the ultimate grounds on which the theory of interpretation rests.

27 The remarks in the text are just the barest sketch of how an argument would go. For development of the argument, see Greenberg 2014: 1334-1337.
It might be thought that my argument entails that there is no way to argue for a theory of interpretation other than by appealing to – and, ultimately, defending – a theory of law. I do not think that such a strong conclusion is warranted, however. A theorist might begin with firm convictions about the way in which some interpretive questions must come out. For example, one might take it as a fixed point that the fourteenth amendment of the U.S. Constitution must have the consequence that segregated public schools are unconstitutional. A theorist might also appeal to intuitively attractive theoretical principles or considerations. Some possible examples: a good theory of legal interpretation should avoid absurd results; should give importance to the linguistic meaning of authoritative legal texts; should have the consequence that the content of the law is accessible; should respect democratic values. Starting with a set of convictions about interpretive outcomes and some prima facie attractive principles, a theorist could use a method analogous to reflective equilibrium to develop and support a theory of legal interpretation. So there are resources for developing and defending a theory of legal interpretation without appealing to a full-blown theory of law.

On the other hand, there are significant limits to how much progress can be made with such a method. To begin with, it would be difficult to find many theoretical principles that are sufficiently uncontroversial to serve as starting points. And there are many competing theories of interpretation that can account for all or most widely shared convictions about interpretive outcomes while respecting uncontroversially attractive theoretical considerations.

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28 I am grateful to Seana Shiffrin for discussion of this point.
29 It is worth noting that the responsibility of a theory of legal interpretation to a theory of law is not avoided by the use of a “bottom-up” or reflective-equilibrium-type method to defend the theory. If the theory of legal interpretation is true, it must be in virtue of the fundamental determinants of the content of the law, and so the theory must, regardless of how it is defended, be consistent with a plausible theory of law.
Ultimately, there will be conflicts between competing theories of legal interpretation that can only be resolved by resolving debates between the underlying theories of law. Some theories of legal interpretation may be eliminated because they cannot be reconciled with plausible theories of law. Others may be eliminated by a reflective-equilibrium-type method. It seems inevitable, however, that there will remain competing candidates that presuppose different theories of law. (There will also be competing candidates that presuppose the same theory of law; such debates must be resolved by working out the consequences of the relevant theory of law.) If that is right, 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. This consequence is unsurprising because whether a theory of legal interpretation is true depends on how the content of the law is determined.

It might be thought that this implication is problematic. The way in which the content of the law is determined at the most fundamental level is a controversial issue in the philosophy of law. Therefore, my argument has the consequence that debates over legal interpretation ultimately depend on a controversial issue in philosophy of law.

This implication is no objection, however. First, there are far fewer theories of law than there are theories of legal interpretation, so the debate would be greatly narrowed if it were honed down to the issue of how the content of the law is determined. More importantly, it is a good thing if debates about legal interpretation are focused on what is ultimately at issue. Because a theory of legal interpretation is made true primarily by the way in which the content of the law is determined at the fundamental level, it is healthy to recognize the dependence of debates about legal interpretation on debates about how the content of the law is determined. In addition, as I have emphasized, many currently influential theories are not appropriately linked
to any plausible theory of law, relying on ad hoc arguments and the like. Consequently, a great
deal of progress could be made in theorizing about legal interpretation without resolving the
question of how the content of the law is determined. Moreover, there may be a two-way street
between the development of theories of legal interpretation and of theories of law, since theories
of legal interpretation may stimulate new theories of law.

4. Three objections

In this section, I address three objections and in the process elaborate my account of the
relation between legal interpretation and how the content of the law is determined.

First, I have written as if a theory of legal interpretation presupposes a unique account of
how the content of the law is determined. An objector might point out that some differences in
metaphysics do not have implications for epistemology. In particular, it is possible for there to
be different accounts of how the content of the law is determined that have the same implications
for legal interpretation. (At one extreme, two accounts could have the same implications for
interpretation with respect to all possible legal systems; at the opposite end of the spectrum, they
could have the same implications only in the particular circumstances of a specific legal system
at a given time.) We can say that two such accounts are interpretively equivalent (with respect to
the relevant legal systems). Disputes between interpretively equivalent accounts of how the
content of the law is determined are not relevant to legal interpretation.

Although interpretively equivalent accounts are possible, prominent accounts of how the
content of the law is determined in fact have extremely different implications for legal
interpretation. Hartian positivism is probably the most widely held contemporary account of
how the content of the law is determined. I argue in section 9 that it has the consequence that no controversial theory of legal interpretation can be correct. For example, because textualism, purposivism, living originalism, and Dworkinian interpretivism are all controversial in the US legal system, if Hartian positivism is true, none of these accounts of interpretation is correct. By contrast, if Dworkin’s “law as integrity” theory is true, then – at least if Dworkin is right about the consequences of his theory\(^{30}\) – the correct method of legal interpretation seeks the set of principles that best fit and justify the practices of the legal system, including the Constitution, statutes, judicial decisions.

Differently again, Scott Shapiro argues that his Planning Theory has complex consequences for theories of legal interpretation, for example that there are different criteria for the correctness of a method of interpretation depending on why the officials of the legal system accept, or purport to accept, the rules of the system. In an “authority” system – of which the US legal system is probably an example – which method of interpretation is correct depends on the planners’ attitudes about the trustworthiness of the interpreters.\(^{31}\) On my own Moral Impact Theory, roughly speaking, legal interpretation requires ascertaining the moral consequences of the ratification of constitutions, enactment of statutes, and other actions of legal institutions.\(^{32}\) Finally, on the widespread implicit picture of law according to which the content of the law is constituted by the linguistic meaning of the authoritative legal texts, legal interpretation requires

\(^{30}\) As Dworkin himself points out, one could accept his “law as integrity” account of how the content of the law is determined at the fundamental level, but reject his account of its higher level consequences. For example, he describes a “conventionalist” account on which legal interpretation would involve no moral reasoning. See *Law’s Empire* XXX.


\(^{32}\) See Greenberg 2004/2006; 2011; 2014 at 1325-1341. By including the Moral Impact Theory among “prominent theories of how the content of the law is determined,” I don’t mean to suggest that the Moral Impact Theory is prominent to others. But it is prominent to me.
ascertaining the linguistic meaning of those texts. In sum, these five accounts of how the content of the law is determined are likely to have importantly different implications for legal interpretation in the US and similar legal systems. Because we are not in a situation where actual competing accounts of how the content of the law is determined are plausibly interpretively equivalent, we can set aside the qualification that differences in how the content of the law is determined are relevant only to the extent that they have different implications for epistemology.

Second, it might be pointed out that, in some domains (that are plausibly not domains of basic facts, i.e., facts that do not obtain in virtue of the obtaining of other facts), we are able to ascertain the relevant facts without knowing much of anything about the metaphysics. Humans have reliable knowledge of our own mental states, such as beliefs, desires, and emotions, though most humans have never thought about the metaphysics of mind (and the metaphysics of mind is controversial among philosophers). Ordinary people know a lot about their own mental states without ever pausing to worry about metaphysics. To take a different kind of example, mathematicians are adept at amassing mathematical knowledge, despite the fact that the metaphysics of mathematics is highly controversial. Mathematicians have no need to concern themselves with the metaphysics of math in order to discover mathematical truth. It might therefore be wondered why we cannot, in a parallel way, proceed with figuring out the content of the law without worrying about how the content of the law is determined.

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33 In Greenberg (forthcoming), I argue that this "Standard Picture" is most plausibly understood as an account of how the content of the law is determined at the surface level, not the fundamental level.

34 Therefore, when I say, for example, that a theory of legal interpretation presupposes an account of how the content of the law is determined, strictly speaking, I should be understood as saying that a theory of legal interpretation presupposes a set of interpretively equivalent accounts of how the content of the law is determined.
The cases of our own minds and of mathematics are special because, in these domains, 
we have methods of acquiring knowledge that we have reason to believe are reliable. And, 
crucially, our reasons for believing that these methods are reliable do not depend on an 
understanding of the metaphysics of the domains. In the mental case, we presumably have 
innate mechanisms that are sensitive to our own mental states. Those innate mechanisms, to the 
extent that they are reliable, track the relevant facts, but they operate unconsciously. Because 
these mechanisms do the work for us, one does not need to be consciously aware of what lower-
level facts make it the case that one has a belief or a fear. (Recent developments in psychology 
as well as older Freudian ideas suggest that people’s knowledge of their own minds is less good 
than people typically assume, but we can set this point aside for the sake of argument.) In the 
mathematical case, the method of acquiring knowledge – mathematical proof – is virtually 
uncontroversial among mathematicians until one reaches the most recondite questions. In 
addition to the consensus of mathematicians, the extraordinary success of math-based science 
and technology gives us reason to be confident in the reliability of mathematical methods.

The legal case is utterly different. Far from there being an uncontroversial method of 
legal interpretation that we have reason to believe is reliable, there is widespread debate over the 
correct method of legal interpretation. Competing theories of legal interpretation take 
inconsistent positions about the role of the communicative intentions of legislatures, public 
meaning, moral values, contemporary understandings, historical practices, and much more. If 
mathematicians had comparable debates about how to discover mathematical truth, then points 
parallel to the ones that I have made about legal interpretation would apply. Indeed, it is worth 
noting that, even when we have reliable methods like those in the mental and mathematical 
cases, those methods are correct, to the extent that they are correct, because of the underlying
metaphysics. The mechanisms that give us first-person knowledge of our own minds are reliable only because, and to the extent that, they track the determinants of our mental states. If it turned out, surprisingly, that in a particular subfield of mathematics, the determinants of mathematical facts could not be reliably tracked by standard methods of mathematical proof, mathematicians would need new methods for acquiring knowledge in that subfield.\(^{35}\)

The third and final objection is that my argument seems to assume that, with respect to every issue, there either is, or is not, applicable law. This assumption, the objection continues, conflicts with the phenomenology of judging (and perhaps of lawyering as well). Judges do not feel that they face two cleanly distinct types of situations: one in which there is an applicable legal standard that must be followed and another in which there is no such standard and judges are free to do as they please. I will make several points in response.

First, remember that when I say that a case is not resolved by applicable law, I mean that there are at least two legally permissible outcomes. But that is not to say that the outcome is not strongly constrained by law. So one reason why a judge would feel not suddenly feel free is that even when the case is not resolved by applicable legal standards, the law may exclude many possible outcomes. And one reason why a judge might experience a continuum of freedom from applicable law is that there is in fact a continuum from cases in which the first-order legal

\(^{35}\) What about ethics? It is controversial how much consensus there is regarding methodology in ethics. If we restrict ourselves to Anglo-American moral philosophy, ignoring, for example, people who claim to acquire ethical knowledge by divine revelation or by consulting their reactions of disgust, there is arguably somewhat less controversy over the methods of acquiring ethical knowledge than in the legal case. To the extent that there is an accepted method that is known to be reliable, ethics can be treated like the mathematical case. But ethics certainly lacks anything like what mathematics has – a method that is agreed by all to be fully reliable. Partly as a result, there is a great deal of disagreement over first-order ethical propositions. In order to make progress in ethics, we therefore need to settle disputes about methodology. I would make arguments about the epistemology of ethics that are parallel to those that I make about law. The method of ethics is responsible to metaethics. To take one example, if Cornell moral realism is a true account of metaethics, then the reflective equilibrium method would plausibly not be a reliable method of learning about ethics.
standards permit only one outcome to cases in which the first-order legal standards place little constraint on the outcome.

Second, as mentioned in section 2, even when a case is not resolved by applicable law in the sense that there is no first-order legal standard that dictates a unique outcome, there may often be second-order legal standards that control how the case should be resolved. (Moreover, some such second-order standards would have the consequence that reasoning about which legal standard to create would involve considerations intimately related to figuring out what the statutory scheme requires. An example would be a requirement that, when a statutory scheme leaves a specific question unresolved, the judge is legally required to create law interstitially in a way that best fits the rest of the statutory scheme.)

Third, the sense that judges are constrained even after the law has run out might be fostered by a very simple picture of the metaphysics of law. Suppose that a theorist assumes that if the plain language of the most obviously pertinent constitutional provisions, statutes, judicial decisions, and the like does not clearly resolve an issue, then the law does not resolve that issue. The theorist then observes that judges (and lawyers), even after they recognize that the plain language of the relevant materials does not clearly resolve an issue, continue to engage in legal interpretation, closely scrutinizing the relevant texts (as well as other, less facially relevant texts) and making arguments about how they are best interpreted. Such a theorist might well conclude that, even after the law has run out, judges (and lawyers) do not feel unconstrained.

Nothing in this line of thought presents any objection to my argument. A very plausible understanding of the situation is that judges, whatever they might say when engaged in theoretical reflection, do not work with the simple picture of the metaphysics of law that the theorist assumes. When they find that the plain language of the relevant texts does not clearly
resolve an issue, they do not conclude that there is no law on that issue. They continue to engage in legal interpretation because they are trying to ascertain what the law is. Of course, it is a separate issue whether judges are correct to think that there is law for them to ascertain. And that issue turns on the metaphysical question of how the content of the law is determined. (Obviously, it would be question begging to assume the very simple picture of the metaphysics of law, which, if known to be accurate, would largely eliminate the interest of legal interpretation — understood in the way I have elucidated — by restricting it to cases in which it is obvious what the content of the law is.)

Finally, and most importantly, it is sometimes uncertain whether there is a first-order legal standard that resolves a particular issue. Uncertainty about whether there is law on a given issue provides no reason to doubt that there either is or is not law on the issue. But it helps to explain why judges do not feel a sharp divide between cases that are governed by law and cases that are not. It is rarely clear that there is no first-order legal standard on a given issue; uncertainty is much more common. Consequently, judges will typically not be confident that there is no applicable legal standard. Moreover, it is plausible that, when faced with such uncertainty, judges think that a judgment that there is in fact no legal standard must not be made lightly; rather, they take themselves, as a rule, to be bound to make all possible efforts to ascertain whether one legal position is better supported by relevant arguments.

Now what judges should do when they are uncertain whether there is a controlling legal standard is an important question for a theory of legal interpretation. The point that I want to emphasize here is that the answer to this question depends importantly on the way in which the content of the law is determined. (Indeed, when a judge should be uncertain whether there is a controlling legal standard itself depends on how the content of the law is determined.) Where
the line between law and no law falls depends on how the content of the law is determined. Similarly, how often there is no law governing an issue depends on how the content of the law is determined. For example, on the very simple picture of the metaphysics of law just mentioned, there is no law whenever the plain language of the relevant texts does not clearly resolve the issue, so there will very often be no law. On a very different picture of the metaphysics of law on which, to put it crudely, there is law whenever the relevant arguments on one side are better than those on the other, the line will fall in a very different place and there will be law much more often. (I don’t mean to offer this picture as a serious account of the metaphysics of law; rather, I am just gesturing at a type of picture that contrasts with the simple one.) Thus, cases in which there is uncertainty about whether there is a governing legal standard present no objection to my thesis about the responsibility of theories of legal interpretation to theories of how the content of the law is determined.

In sum, the phenomenology of judging provides no compelling reason to doubt that, on each case, there is or is not a governing legal standard.36

An objector might nevertheless press the possibility of indeterminacy about whether there is a governing legal standard. Notice that this would be higher order indeterminacy, rather than indeterminacy about what the law is on some issue. That is, the objector suggests that it could be indeterminate whether there is or is not a legal standard. I’m inclined to make the simple response that higher-order indeterminacy of this sort is, for the purposes of legal interpretation, tantamount to first-order indeterminacy. On this line of thought, if it is indeterminate whether there is or is not an applicable legal standard that the resolves the relevant issue, then the law leaves the issue unresolved. A more nuanced answer is that whether or not such indeterminacy is possible, what it would look like, and in what circumstances it would obtain all depend on how the content of the law is determined. Thus, to the extent that a theory of legal interpretation might treat higher-order indeterminacy differently from first-order indeterminacy, such higher-order indeterminacy constitutes no exception to the responsibility of a theory of legal interpretation to a theory of law.

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5. Another Objection: Legal Interpretation as Ideal or Second-Best Theory?

I have so far taken a theory of legal interpretation to be an ideal theory. That is, a theory of legal interpretation specifies how to work out what the law is without taking into account limitations of particular investigators or types of investigators.

It might be objected that a theory of legal interpretation should not be concerned with ideal theory, but with second-best theory. Because of the limitations or biases of particular institutional actors, those actors would do a better job of complying with ideal theory in the long run if they did not attempt to follow the ideal theory of legal interpretation directly, but simply adhered to specific rules. This general type of idea – that agents operating under particular constraints may in the long run better achieve an overall goal by following second-best rules – is a familiar one from discussions of rule utilitarianism. In designing a legal system, it could be sensible to require particular institutional agents not to follow the ideal theory of legal interpretation, but to follow second-best rules. Adrian Vermeule has powerfully argued for such a conclusion.37 According to the imagined objection, since judges and other agents will in the long run do a better job of complying with the ideal theory by following second-best theory than by trying to follow ideal theory directly, it is a mistake to think that legal interpretation should be concerned with ideal theory at all.38

38 Vermeule also suggests that, as a result, a theory of legal interpretation need not be concerned in practice with how the content of the law is determined. See note 39.
There are several answers. First, the subject of legal interpretation understood as ideal theory is of independent theoretical interest, whatever the practical importance of second-best theory.

Second, a second-best theory has to be relative to a particular type of institution, with its particular limitations. But legal interpretation is not only a matter of practical rules for specific institutions. A theorist or scholar can engage in legal interpretation – and therefore care about the correct approach to legal interpretation – without any specific institution in mind.

Third, it may well be that second-best rules have to be imposed as a matter of overall system design. In Anglo-American legal systems as they are presently constituted, there is a strong argument that it is not legally permissible for a judge to unilaterally decide to follow a second-best rule. Following a second-best rule makes a difference only when it leads a judge to decide a case differently from the way in which the judge would have decided the case if the judge had attempted to decide the case according to the applicable legal rules directly. Plausibly, a judge who believes that one party has a legal right to prevail on substantive legal grounds may not simply decide to resolve the case against that party on the basis of a second-best rule on the ground that adherence to that rule is likely to lead to more legally correct outcomes in the long run. (And, if that is right, it may be impermissible for a judge to circumvent this problem by deciding not to do her best to determine which party has a legal right to prevail.) Similar arguments apply to other institutional actors. Thus, although second-best theory is important for system designers or reformers, it may not be of practical relevance to ordinary judges, prosecutors, and administrative agencies as things now stand.

Fourth, the very attraction of second-best theory presupposes a consequentialist assumption that the relevant values, whatever they are, always support following a rule that
maximizes the number of cases in which the relevant values are adhered to – even when the agent is confident that following the rule in the present case goes against the relevant values. But such an assumption is controversial. One familiar problem is that some values may be agent relative. For example, it is plausible that I may not betray a friend even if doing so would lead to fewer betrayals of friends in the long run. The question of whether the underlying consequentialist assumption is correct with respect to the values relevant in the legal case is a difficult philosophical issue in its own right, and beyond the scope of this article. The problematic nature of the assumption, however, provides another reason for the importance of legal interpretation as understood here.

Finally, and most importantly, ideal theory has metaphysical and epistemic priority over second-best theory. The metaphysical priority is obvious. The correctness of the ideal theory does not depend on second-best theory, but the correctness of a second-best theory depends on which ideal theory is true. Suppose it is true that a certain group of judges would come closer to complying with the ideal theory by trying to follow a particular set of rules rather than by trying to follow the ideal theory directly. Obviously, that truth holds partly in virtue of what the ideal theory specifies. Thus, the importance of second-best theory provides no objection to my argument that a theory of legal interpretation is responsible to a theory of law.

Ideal theory also has epistemic priority. In order to work out which second-best rules particular actors or institutions would do best to follow, we need to know what ideal interpretation would look like. Whether it is true that a particular institution, with particular limitations, would (in the long run) be most successful at complying with ideal theory by following particular second-best rules is a difficult empirical question. Investigating the question requires comparing how well an agent with particular limitations would succeed in complying
with ideal theory by trying to follow ideal theory directly as compared with how it would do by following candidate second-best theories. No such comparison can be made without the ideal theory. Thus, we need to know the ideal theory in order to ascertain which second-best theory is correct. Indeed, because this paper does not take a position on how the content of the law is determined — and therefore does not take a position on which ideal theory of legal interpretation is correct — we cannot here engage in second-best theorizing.

In sum, regardless of whether it might be wise to impose certain second-best rules on particular institutional actors, ideal theory remains of independent theoretical and practical importance. And, to reiterate, however important second-best theory may be, it provides no objection to the claim that a theory of legal interpretation is responsible to a theory of law.

6. The content of the law versus the linguistic meaning of the legal texts

_The Linguistic Meaning versus Legal Content Principle: A theory of legal interpretation must distinguish between the content of the law and the linguistic meaning of the legal texts._

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39 Vermeule argues that, in some cases, even without resolving underlying debates about how the law is determined, we can be confident that judges would do better to follow a second-best procedure. He gives the example that intentionalists and textualists should both accept that, given the limitations and tendencies of judges, judges would come closer to correct interpretations of the law restricting their attention to clear and specific statutory language and not considering other evidence of legislative intention.

It is obvious that differences in ideal theory can in principle make a difference to which second-best rules would produce the best results. Vermeule’s claim is that, in practice, all plausible ideal theories of legal interpretation would yield the same second-best rules. But given the diversity of theories of legal interpretation and how little we know about the results that different institutional actors would likely produce if they attempted to follow different approaches, any such claim is both tendentious and premature.

And, at any rate, it is the job of theorists to work out which ideal theories of legal interpretation are plausible. Typically the way in which a field as a whole comes to views about which theories are plausible is through particular theorists trying to figure out which theory is true, and developing and defending their preferred accounts. Without theorists developing and defending particular ideal accounts, we would not be in a position to evaluate the relative plausibility of different candidates.
Moreover, a theory of legal interpretation that holds that an interpreter’s ultimate goal is to ascertain the meaning of legal texts must offer an argument connecting the meaning of legal texts to the content of the law.

Theorists of legal interpretation often do not distinguish carefully between the ordinary linguistic content or meaning of the legal texts and the content of the law. (The point of the qualification “ordinary” is that the linguistic content of a legal text is an instance of linguistic content generally, not something specially legal.) When theorists talk about, for example, the meaning of a constitutional provision, it is often unclear whether they are talking about a linguistic content or a legal content.\footnote{See, e.g., Goldsworthy (2009); Greenawalt (2002).} Contributing to the problem, the terminology in this area is slippery. For example, talk of what a constitutional provision “says,” “states,” or “asserts,” or of its “content,” is ambiguous between, on the one hand, aspects of the linguistic meaning of the statutory text and, on the other, the impact of a statute on legal obligations, powers, and the like. In addition, the term meaning itself has many different uses.

To avoid ambiguity, I will use linguistic content (or sometimes meaning and its cognates) to refer to the information that language enables us systematically to convey to others. Linguistic content is to be distinguished from meaning in the loose non-linguistic sense that is roughly equivalent to significance or upshot. For example, we might ask the meaning of a recent political event or an embarrassing situation. More importantly, for present purposes, linguistic content is to be distinguished from the content of the law – what the law requires and permits.

As we will see in section 7, linguistic content is not one monolithic thing: the contemporary study of language has distinguished multiple types of ordinary linguistic content.
I will use linguistic content or meaning to refer generally to any of these (and more precise terms for the specific types of linguistic content).

Our starting point is that legal interpretation seeks the content of the law. The content of the law consists of obligations, rights, powers, and the like. By contrast, linguistic meaning is information represented by symbols. These two things are not even of the same general category. And, as a general matter, the content of norms need not be determined by information represented by symbols. After all, there are systems of norms in which texts or other symbols have no constitutive role.

Morality is one example. We use symbols to talk and think about morality, and it might be true that creatures without symbols could not be subject to moral norms. But many moral norms do not obtain in virtue of the existence or production of certain texts or symbolic representations. The content of the moral norms is not determined by the information represented by symbols. (At least, this is true on standard views about morality.) The point is not limited to domains of robust normativity such as morality. Whatever is the truth about the actual norms of etiquette (or fashion), we can easily imagine norms of etiquette that obtain in virtue of customs rather than in virtue of the symbolic representation of information.

It may turn out that, according to the best theory, what legal obligations people have is determined exclusively by what certain legal texts mean. Perhaps this is even true as a matter of

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41 Citation for the distinction between robust and formal normativity.
necessity – there is no possible legal system in which the law is differently determined. But it is far from obvious that it is true.\footnote{To put matters in a slightly more technical way, the concept of what the law requires is a different concept from the concept of the meaning of the authoritative legal texts. (Notice, for example, that they have different component concepts, and that someone could have one concept without having the other.) Two distinct concepts may of course refer to the same substance or object; they may even do so necessarily. But it requires investigation or argument to show that they do. The concept of Obama’s favorite drink is a distinct concept from the concept of hydrogen hydroxide or H2O. But we could discover that these concepts happen to have the same referent. Even if two concepts \textit{necessarily} have the same referent, it may be far from obvious that they do. The concept of an equilateral triangle is distinct from the concept of an n-sided polygon that can be inscribed in a circle regardless of the length of its sides, though it can be proved that these concepts necessarily are co-referential.}

One way to see this is just to notice that there are coherent, and indeed popular, theories of law on which the law diverges from what the authoritative legal texts mean. To take one example, on a popular kind of intentionalist theory of statutes and constitutions, the content of the law depends at least in part on the \textit{legal intentions} of the legislature or framers. (A legislature’s legal intention in enacting a provision is the change in the law that it the legislature intends to effect, or, to put it another way, the legal norm it intends to enact. On no colorable theory of linguistic meaning is an agent’s legal intention in pronouncing a text constitutive of the linguistic meaning of the text.\footnote{On legal intentions see section 8 below. On the distinction between legal and linguistic intentions, especially communicative intentions, see Greenberg 2011 and forthcoming.}) To take a very different example, on Dworkin’s “law as integrity” theory, the content of the law is, as noted above, the set of principles that best fit and justify the past decisions of legal institutions (and the requirements that follow from those principles). On either theory, the content of the law is not determined by the linguistic meaning of the authoritative legal texts.
A different point is that it is plausible that there are customary legal norms for which there are no relevant authoritative legal texts. If this is right, it is enough to undermine the simple view that the content of the law is solely constituted by the meaning of authoritative legal texts. Furthermore, if an entirely custom-based legal system is possible, then it is not necessary that the content of the law is determined even in part by the meaning of authoritative legal texts.

Given the distinction between what the law requires and the ordinary meaning of the authoritative legal texts, any assumption that what the law requires is – or is determined by – the meaning of the authoritative legal texts requires argument. In light of our starting point that legal interpretation seeks to discover the law, a theory of legal interpretation must not assume without argument that the goal is to discover the ordinary meaning of the authoritative legal texts.

7. The distinction between different types of linguistic content

The Linguistic Multiplicity Principle: A theory of legal interpretation must distinguish between different types of linguistic content (and a claim about the relevance of a particular type to legal interpretation must be appropriately based on a theory of law).

It is uncontroversial that linguistic content of the legal texts is highly relevant to legal interpretation. As discussed in section 6, when theorists of legal interpretation write about “the meaning” of a statutory or constitutional provision or other legal text, it is often unclear whether they are referring to the provision’s contribution to the content of the law or to its linguistic meaning. Even once we are clearly focused on linguistic content, however, there are many different types of linguistic content. (Moreover, and this is a separate point, there is a great deal
of controversy about what the theoretically important types are.) For illustrative purposes, I will focus on a few prominent categories.

*Semantic content* is, roughly speaking, the information conventionally encoded in the linguistic expressions. In non-technical terms, the semantic content of a sentence is approximately its literal meaning.

By contrast, there are pragmatically communicated contents, ones that the speaker means or intends to communicate by uttering certain words (and typically can reliably communicate in that way), but that go beyond the literal meaning of the words. For example, Paul Grice’s seminal work introduced the notion of *speaker meaning*. Grice made an important distinction between what linguistic expressions mean (semantic content) and what speakers mean by uttering them. On Grice’s account, speaker meaning is the content of certain complex intentions of the speaker. Roughly, the speaker meaning of an utterance is what the speaker, in making the utterance, intends that the hearer come to believe *by recognizing that very intention*. For example, the semantic content of the sentence “I have eaten breakfast” is plausibly that I have eaten breakfast at least one time in my life. In typical contexts, however, I utter this sentence in order to communicate that I have eaten breakfast *today*. To take a different kind of example, suppose that in response to an invitation to a party, I say “I have a deadline that I have to meet.” I *mean* that I will not go to the party, and my interlocutor will no doubt be able to infer this. But that I am not going to the party is not part of the literal meaning of the words. Hearers are adept at inferring what speakers mean. Indeed, we recognize the speaker meaning so effortlessly that it often requires technical expertise to explicitly identify the semantic content of the words.

In many — but not all — cases, the speaker meaning does include the literal meaning of the sentences, but it also includes further information. The two examples in the previous
paragraph illustrate the phenomenon that Grice called “conversational implicature”. A content that is merely implicated is a component of what the speaker means or intends to communicate that is not part of what the speaker says or asserts. Linguists now distinguish many types of implicature.

Following Grice, many theorists have identified or closely linked what is said with the semantic content of the words. Recently, however, several theorists have argued that even what is said typically goes well beyond the semantic content, though it stops short of all that is meant. On this kind of view, we need a three-way distinction between semantic content, what is said, and what is meant (including what is merely implicated).

Next, we have communicative content. Different theorists have different views about what constitutes the communicative content of an utterance. On a broadly Gricean view, the communicative content would be the content of the speaker’s communicative intention in making the utterance. On a more natural understanding, information is not communicated unless there is uptake by the audience, as well as the intention to convey the information. Thus, the communicative content of an utterance could be understood as that part of what the speaker intended to communicate that was recognized by the audience. And there are other possibilities. On some views that have recently entered the legal interpretation debate, communicative content is something like what a reasonable member of the audience would understand the speaker to have intended to communicate. (I discuss this type of content below as part of a family of contents that depend on the understanding of a reasonable member of the audience.) Differently again, there is that part of what the speaker intended to communicate that a reasonable member...

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44 See, e.g., Soames XX.
of the audience would be expected to recognize. For our purposes, nothing turns on which of these contents is communicative content properly understood. For even if a content is not communicative content – indeed, even if it does not play an important role in the study of language – it may be highly relevant to the content of the law. In section 8, I elaborate on potential determinants of the content of the law that are not linguistic contents.

In recent years, theorists of legal interpretation often appeal to what they call “public meaning” or “objective meaning.” These terms are not standard technical terms in the study of language. Roughly, the idea is to appeal to the understanding of a reasonable member of the audience. But there are many different notions of public meaning. For example, one dimension on which notions of public meaning vary is the object of audience understanding. We have already encountered the notion of what a reasonable audience would understand the speaker to have intended to communicate. Varying the object of audience understanding yields other notions: what the audience would understand the semantic content to be; what the audience would take the speaker to have asserted or committed herself to (as opposed to merely implicated); what legal norm the audience would take the legislature to have intended to enact; what legal norm the audience would take the legislature to have enacted. Many notions of public or objective meaning — such as the notion of what legal norm the audience would take the legislature to have intended to enact – are not concerned with linguistic meaning at all, and many others are not important theoretical notions in the study of language. For this reason, I discuss notions of public meaning in section 8, which concerns determinants of the content of the law that are not linguistic contents.

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45 Citations.
46 In section 8, I introduce the term legal intention for such an intention.
It should be clear at this point that there are multiple candidates for linguistic contents that are determinants of the content of the law: so far, we have at least semantic content, what is said, speaker meaning, different notions of communicative content, and the family of ‘public meaning’ notions. There are many other possibilities. Solum, for instance, develops a notion of clause meaning by starting with semantic content and modifying it, for example by adding certain contextual effects, implications, and stipulations. There are more fine-grained distinctions as well. For example, there are many types of implicatures, and it may well be that some types are relevant to the content of the law, while others are not.⁴⁷

I want to forestall one natural misunderstanding. It might be thought that what I have been calling “different types of linguistic meaning” represent different and competing ways of reading texts. It might even be thought that the existence of different types of meaning implies some kind of indeterminacy about the meaning of texts. But this is a mistake. The different types of linguistic meaning are not in competition with each other in a way that would make it coherent for the meaning of a text to be indeterminate between them (or for one of them to be “the meaning” of a text). Rather, the point is that there are different types of meaning that play different and compatible – indeed complementary – roles in language and communication.

For example, on a theory that recognizes semantic content, what is said or asserted, speaker meaning, what is conversationally implicated, and what is (successfully) communicated, there is no coherent debate about whether “the meaning” of an utterance is one of these contents rather than another. The utterance may determinately have all these different types of meaning. On a particular occasion, the words uttered have a semantic content, and the speaker uses that

⁴⁷ See Greenberg 2011 XX.
semantic content to assert a particular content. What the speaker means may go beyond what is asserted, for it may include what is conversationally implicated. If things go well, the audience may use the semantic content of the words, among other things, to infer what the speaker means, resulting in successful communication of the speaker meaning. But the audience may fail to infer part of what the speaker intended to communicate, so what is successfully communicated may be only part of what the speaker intended. There is no sense in which, for example, the semantic content, the speaker meaning, and what is successfully communicated are competing readings of the text.

A very different point is that, as I have already hinted, there is a lively debate among different theories of meaning. Some disputes are about relatively fine-grained issues, such as how to understand what is said and how different it is from semantic content. But the study of meaning is a relatively young field, and there are radical disagreements about the most fruitful way of carving up the phenomena.48 Again, I do not mean to suggest that the existence of competing theories implies any indeterminacy about meaning. No doubt some theories will turn out to be better than others. The significance for legal interpretation is that, at least at this stage in the study of language and communication, theorists of legal interpretation cannot simply defer to one consensus model of what the relevant types of meaning are.

One immediate consequence of the existence of different types of linguistic content – not to mention candidates that are not linguistic contents – is that a theory of legal interpretation that insists that its preferred candidate is the only available one is flawed. For example, many theorists have tried to argue that there is no alternative to seeking the intentions of framers or

48 Citations to, for example, dynamic semantics, relevance theory, radical pragmatics.
legislators, for example on the ground that texts without intentions are just marks on paper.\textsuperscript{49} Conversely, Solum defends his favored ‘clause meaning’ by arguing that, because the framers of the Constitution did not have the intentions constitutive of speaker meaning, the meaning of constitutional provisions must be their semantic content (with certain modifications).\textsuperscript{50} Such arguments neglect many alternative candidates.

A second consequence is that theories of interpretation that assign a role to “the meaning” of the relevant texts, without elaborating the specific type of linguistic content, are underspecified. Similarly, it is common for legal interpreters to make claims beginning “the meaning of a text is,” and concluding with a preferred candidate, such as what the speaker intended to communicate or what a reasonable member of the audience at the time would have taken the words to convey. Unfortunately, given the multiplicity of types of linguistic content, no such claim can be correct.

A related pitfall is to specify a type of meaning that, in light of what we know from the study of language, is not well defined. For example, one might be tempted at first blush to take textualists to be concerned with semantic content. Their emphasis on texts naturally suggests the meaning that is encoded in the text. But prominent textualists urge that the relevant factor is not literal meaning. Along the same lines, contemporary textualists endorse canons of interpretation such as \textit{inclusio unius est exclusio alterius} (the inclusion of one is the exclusion of another) that are probably best understood as ways of getting at what the speaker intended to communicate.\textsuperscript{51} But textualists reject the idea of looking to the content of the speaker’s intentions.

\textsuperscript{49} Citations
\textsuperscript{50} Solum XXX at 52.
\textsuperscript{51} See Manning XXX.
Similarly, many legal theorists, including textualists, assume that linguistic meaning changes with context in a way that is not accepted by mainstream views about language. On standard views in the philosophy of language, what textualists mean by context – roughly, surrounding language – is not a determinant of meaning. Rather, context is thought to provide a way of inferring the intentions of the speaker. It can be evidence, for example, of what the speaker intended to communicate. In *Smith*, the famous case concerning the phrase “use a gun”, Justice Scalia suggests that the meaning of “use” changes depending on the context, so that in some contexts, it means something like *use for its intended purpose*. The study of language provides no support, however, for the idea that the meaning of words varies with context in this way.

8. Candidates other than linguistic contents

*The Other Determinants Principle: A theory of legal interpretation must recognize potential determinants of the content of the law other than linguistic contents.*

There are candidates for determinants of the content of the law other than linguistic contents. One example we have already encountered is the content of the legislature’s or framers’ legal intentions.

Intentions of lawmakers are an important source of potential determinants of the content of the law, and, just as it is important to distinguish different types of linguistic content, we must distinguish different kinds of intentions. First, there are intentions to produce certain consequences in the world, such as to reduce crime or to stimulate research into alternative energy sources. Such *practical* intentions are typically to modify behavior in a particular way.
Second, lawmakers may have legal intentions – intentions to modify the content of the law by, for example, creating new legal obligations or powers. Third, they may have various kinds of linguistic intentions, such as which language they intend to be writing in and which particular words they intend to use. An especially important category of linguistic intentions are communicative intentions, for example, the intention to communicate a particular content by uttering a given linguistic expression.

Linguistic intentions are intimately related to the linguistic content of the relevant texts. As noted above, for instance, Gricean accounts maintain that speaker meaning is constituted by the content of a specific kind of communicative intention.

Legal intentions, by contrast, are fundamentally distinct from linguistic intentions: because they are intentions to change the law in a particular way, they need not (and generally do not) include any reference to linguistic expressions or meaning. For example, a typical legal intention might be to increase the penalty for a particular crime or to require employees of restaurants to wash their hands. Thus, legal intentions are a potential determinant of the content of the law that is not any type or part of linguistic content. 52

Another such determinant is the notion of statutory or constitutional purpose appealed to by purposivist accounts of legal interpretation. Hart and Sacks’s *The Legal Process* is often cited as the classic statement of this kind of approach. A court is to “decide what purpose ought to be attributed to the statute … on the assumption that the legislature consisted of reasonable persons 52

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52 The legislature’s legal intention, as I use the term here, must be distinguished from the legislature’s intention that the legal norm that it enacts apply or not apply to a particular activity – what we could call its *application intentions*. For example, a legislature might enact a statute with the legal intention of requiring that people with contagious diseases be quarantined on entering the country. The legislature might have an application intention that people with psoriasis be covered by the statute, for the legislature might mistakenly believe that psoriasis is a contagious disease. But that application intention is distinct from the legislature's legal intention. On the distinction between legal and communicative intentions, see Greenberg 2011.
pursuing reasonable purposes reasonably and to interpret the words of the statute immediately in question so as to carry out the purpose as well as possible.” The relevant purpose is not an actual psychological purpose of any individual or group. Rather, it is a kind of constructed purpose that we attribute to the statute on the basis of certain, probably counterfactual, assumptions, e.g., that the statute was the product of one rational mind.

We’ve seen thus far that some influential theories of legal interpretation appeal to candidates that are not linguistic contents. It’s worth noting, in addition, that any serious theory of law accepts that factors other than linguistic contents are relevant to determining the content of the law. This point can easily go unnoticed when considering approaches that hold that a provision’s contribution to the content of the law is a linguistic content, for example, its plain meaning or communicative content. On any account, however, the content of the law depends not merely on the linguistic content of the text, but also on such facts as that the text was enacted in accordance with specified procedures by a certain authority. Plausibly, the relevant facts will include things like the historical context in which the text was enacted. Moreover, accounts of legal interpretation often appeal to real-world consequences and to moral values – democratic considerations, rule of law, popular sovereignty – to support a preferred candidate for a provision’s contribution to the content of the law. The implicit assumption seems to be that such factors have a bearing on how the content of the law is determined. And they lack even the form of linguistic contents.

It is often implicitly assumed that the role of democratic considerations, consequences of an interpretive method, and the like is to favor one candidate content over others (or, less plausibly, to help to determine what a text’s linguistic meaning is). But if such factors are relevant to the content of the law, it can’t be assumed that this is the only kind of role they can
play. Theories of law may assign a wide range of roles to factors other than linguistic contents. On Ronald Dworkin’s influential theory, as mentioned, a statute’s contribution to the content of the law is roughly the principles that would best fit and justify the statute’s enactment. On this theory, the statute’s contribution is not any linguistic content of the statutory text, and moral values play a more complex role in determining a statute’s contribution than favoring one linguistic content over others.

Another kind of non-linguistic candidate for a determinant of the content of the law emerges from consideration of the notion of ‘public’ or ‘objective’ meaning introduced in the previous section. We saw, for example, that by varying the object of audience understanding, we obtain a range of contents such as what the reasonable audience member would take the legislator to have intended to communicate.

Such contents inevitably involve a degree of idealization or construction. We need to specify what counts as a reasonable member of the audience, what knowledge a reasonable member of the audience is taken to have, and so on. For example, it is often the case that many or most members of Congress did not read the relevant words of a statute and therefore have no linguistic intentions with respect to them. Moreover, to the extent that they have linguistic intentions, the two Houses of Congress and the President may well have different linguistic intentions. Are we to ask what a reasonable member of the audience who knows such facts about the legislative process would take Congress and the President to have jointly intended? Presumably not. We might rather ask what a reasonable person would take a single hypothetical speaker who had uttered the words of the statute to have intended.

At this point, it is clear that we are in the business of constructing a content. There are various ways to flesh out the relevant stipulations. Perhaps the single hypothetical speaker...
should be taken to be ideally rational. And what context should be stipulated? Theorists who favor an objective notion of communicative content generally assume that we should take the relevant context to be ordinary communication or conversation. In ordinary conversation, a standard view is that the audience works out what the speaker intended to communicate by assuming that the speaker is trying to comply with certain principles, such as Grice’s principle of cooperation and maxims of conversation. But why should we take the question to be what a speaker who had uttered the words in ordinary communication and in compliance with conversational principles would have intended? The purposes and context of legislation are very different from ordinary communication. We might instead ask what a single rational lawmaker who had complied with all applicable principles of legislation would have intended.

The existence of candidates for a provision’s contribution to the content of the law other than linguistic contents reinforces the inadequacy of defending a theory of interpretation by simply offering considerations that favor one’s preferred candidate over one or two other salient candidates. For example, to defend the theory that a statute’s contribution is its communicative content, it won’t do to argue that semantic content is too skeletal or is otherwise a poor candidate. Even showing that one’s preferred candidate is better than all other linguistic contents isn’t enough.

9. Legal interpretation and legal positivism
This section shows that satisfying the Linkage Principle is more difficult than might initially appear. The most widely held contemporary theory of law is inconsistent with any controversial theory of legal interpretation.

The Linkage Principle holds that a theory of legal interpretation is responsible to a theory of law. Hartian legal positivism is the most widely held theory of law today, and is dominant in U.S. law schools. Many theorists of legal interpretation seem to assume that some version of that theory is true, and many more would probably point to it if challenged as to which theory of law they presuppose. Perhaps surprisingly, however, Hartian positivism cannot form the basis for a controversial theory of legal interpretation. According to Hartian positivism, the fundamental determinant of the content of the law is the convergent practices of judges and other legal officials. The problem is that, as a result, no theory of legal interpretation that departs from the consensus practices of judges can be correct.

On the Hartian account, the rule of recognition, which is the fundamental or ultimate determinant of how the content of the law is determined, is constituted by the convergent practices of judges and other legal officials. I will skip the details for present purposes, but the basic point is that what makes it the case that a particular aspect of a constitution or a statute determines the content of the law is a convergent practice among at least a large majority of judges. For example, if judges: 1) regularly treat, say, a statute’s semantic content as its contribution to the law; 2) are disposed to criticize other judges who fail to do so (or threaten to fail to do so); and 3) regard such criticisms as justified, then a statute’s semantic content is its

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53 For example, Larry Alexander explicitly claims that legal positivism supports his particular originalist approach to legal interpretation. Alexander 2015. And, in a recent public exchange at the American Philosophical Association's 2014 Pacific Division Meeting, Scott Soames suggested that he would appeal to Hartian legal positivism as the basis for his account.
contribution to the law. To the extent that there is no consensus on what constitutes a statute’s contribution to the content of the law, a statute’s contribution is indeterminate.

The immediate consequence is that no theorist of legal interpretation can base her theory on Hartian positivism if her theory is to prescribe any approach to legal interpretation that diverges from what is accepted by a large majority of judges. That is, a theorist of legal interpretation who wishes to do anything but repeat the accepted consensus among judges needs a theory of law other than Hartian positivism. For example, an intentionalist or textualist position on Constitutional interpretation is inconsistent with Hartian positivism. For there is anything but a consensus among judges that intentionalism or textualism is correct.

This objection is closely related to Dworkin’s argument from theoretical disagreement in *Law’s Empire*. Dworkin argues that legal positivists cannot explain disagreement about the grounds of law – about what are the ultimate determinants of law.

The problem that I am posing for theories of legal interpretation differs from Dworkin’s theoretical agreement objection to positivism in several ways. Most importantly for present purposes, Dworkin framed his argument as moving from the claims that theoretical disagreement is common and that legal positivism is unable to account for it, to the conclusion that legal positivism is flawed. Given this framing of the argument, Brian Leiter and others have pointed out a way for positivists to respond. Positivists can argue that lawyers and judges who seem to be engaging in theoretical disagreements are in fact either mistaken or disingenuous. For example, when judges seem to be disagreeing about the role of plain meaning in determining the content of the law, they may simply be *deluded* in thinking that there is a fact of the matter on

54 See Leiter, XXX.
the question. In fact, the rule of recognition does not settle the question, so the law is indeterminate as to the role of plain meaning. Alternatively, the judges may be pretending to argue about what the law is, though they in fact realize that there is no answer. They maintain the pretense for political reasons.

Whatever the merits of Leiter’s response as a response to Dworkin, his response is not available to a theorist of legal interpretation. A theorist of legal interpretation cannot take the position that she is erroneous or disingenuous in claiming that own her approach to legal interpretation is correct. If she accepts the Hartian view that the ultimate determination of the content of the law rests on the consensus practices of judges, she cannot argue that a non-consensus method of legal interpretation is correct. In simple form, the dilemma is that the following three propositions are inconsistent: 1) method of legal interpretation M is not widely accepted; 2) method of legal interpretation M is legally correct; 3) legal positivism in its dominant Hartian form is true.

In other words, my objection, unlike Dworkin’s, is directed at theories of interpretation, not at legal positivism. Legal positivism can respond to Dworkin’s objection by accepting that there is a significant amount of indeterminacy with respect to how the content of the law is determined. (And positivists can try to argue that indeterminacy at this level does not result in widespread indeterminacy with respect to run-of-the-mill cases because all plausible accounts of interpretation overlap in their implications for such cases.) But a theorist of legal interpretation cannot accept that it is indeterminate which account of legal interpretation is correct.

A positivist theorist of legal interpretation might try to argue that the correct account of legal interpretation is made correct not by the rule of recognition, but by substantive law. For example, some theorists have claimed that the correct account of statutory interpretation is
determined by the Constitution. It is surely correct that there can be second-order legal standards that govern legal interpretation. The problem, however, is that on the Hartian theory of law, there can be legal standards that determine that a particular method of interpretation is correct only if those standards are recognized by the rule of recognition. In other words, a reading of the Constitution, court decisions, or customs that determines that, say, intentionalism is the correct method of reading statutes would have to itself follow from the consensus practices of judges. Unfortunately, in the U.S. legal system, the consensus practices of judges do not yield second-order standards that resolve the lively disputes over which method of legal interpretation is correct.

Alternatively, a theorist might argue that at a high level of generality there is a consensus among judges on the theorist’s preferred method of interpretation, and that the disagreement is in the application of that consensus. For example, it might be argued that there is a consensus that the communicative content of the legislative texts is determinative, but that some judges have mistaken views about what constitutes the communicative content. Or that there is a consensus that a statute’s contribution to the content of the law is whatever the best understanding of democracy says that it should be, but a disagreement about what democracy requires.

It is not at all plausible, however, that there is such a consensus. Judges do not all agree that, for example, communicative content or plain meaning is controlling. They don’t even agree that the linguistic content of the relevant texts is controlling. Nor do they agree that democratic considerations are the relevant ones. The only kind of consensus is on bland platitudes such as that the meaning of the relevant texts is important. There is neither a consensus of belief nor of practice on any of the issues on which theories of legal interpretation disagree.
10. Applications

Although the principles rest on extremely basic assumptions, they have surprisingly far-reaching implications for a wide range of existing theories of legal interpretation. I have mentioned a few examples along the way. In this section, I examine the implications of the principles for several theories of legal interpretation in more detail.

[This section remains to be written. What follows is really just a placeholder — discussion of one recent theory of legal interpretation. Ultimately, I plan to discuss influential representatives of major camps.]

Scott Soames’s Deferentialism

Scott Soames, a prominent philosopher of language, has in recent years developed a theory of statutory and constitutional interpretation that he calls *Deferentialism*. According to this theory, roughly, we should interpret a statutory or constitutional provision in accordance with its *asserted content* except to the extent that that asserted content is in conflict with “the chief publicly stated purpose that proponents of the law advanced to justify it.” In case of such conflict, “the judicial authority must make new law by articulating a minimum change in existing law that maximizes the fulfillment of the original rationale for the law.” Soames identifies asserted content with what a reasonable person who understood the meanings of the words and the relevant background would take to have been asserted or stipulated by the lawmaker in adopting the text.
Soames does not try to show that the two main components of his account – asserted content and publicly stated purpose – or the roles that he assigns to them have any basis in a theory of law.

First, he says very little about why the chief purpose that proponents of the law advanced to justify it should get the extremely important role that he gives it in constituting the Constitution's contribution. He says only that this stated purpose is what is epistemically accessible and worthy of deference. These considerations are plausibly relevant for normative reasons (though Soames does not say so). For example, epistemic accessibility arguably matters for reasons of fairness and democracy. Similarly, one might argue that democracy does not support giving weight to policy goals of legislators that were not made public. If the view is that the content of the law depends on such normative considerations, then one needs a full-scale consideration of what is supported by all the relevant considerations. On the other hand, if the content of the law does not depend on such normative considerations, then it is unclear why they are relevant to legal interpretation.

Second, with respect to asserted content, much of Soames’s argument is directed at showing that the semantic content of the texts is not a good candidate. For example, Soames insists that, in *Smith v. United States* (the notorious “uses … a firearm” case), "there is no real alternative . . . to identifying the legal content with what Congress actually asserted." He simply ignores all candidates that are not linguistic contents. As the Linguistic Multiplicity Principle and the Other Determinants Principle make clear, eliminating semantic content falls far short of showing that asserted content constitutes the Constitution's contribution to the content of the law.

At various points, Soames relies heavily on an analogy to ordinary communication:
according to Deferentialism, the content of a legal provision can no
more be identified with the meanings of the sentences in the text,
or with the lawmakers' policy goals in adopting it, than the
contents we assert ordinary life can be identified with the linguistic
meanings of the sentences we use, or with our conversational goals
in using them…. Legal content is determined in essentially the
same way that the asserted or stipulated contents of ordinary texts
are.

This theme runs through all of Soames's work on legal interpretation, so I take it to lie at
the heart of his argument. The first premise is that, in ordinary communication, the contents that
we assert can't be identified with the meanings of the sentences we use or with our
conversational goals. Soames then infers that the asserted content of legal texts can't be
identified with the meanings of the sentences or with the policy goals of the lawmakers. Thus
far, all of his claims are about language, and have strong support in the contemporary study of
language.

But Soames next seems to simply assume that the asserted content constitutes the
Constitution's contribution to the content of the law. That is, he seems to move without
argument from the asserted content of the Constitution to the duties and rights it contributes to
the law. In taking for granted that the content asserted by the lawmakers constitutes the
 provision’s contribution to the content of the law, Soames violates the Meaning Versus Law
Principle.

Most importantly, it is difficult to see what plausible and coherent theory of law could
underwrite Soames’s theory. On the one hand, his theory seems to claim on exclusively
linguistic grounds that a particular version of ‘asserted content’ constitutes the content of the law. On the other hand, the theory apparently relies on normative considerations to displace asserted content in specified circumstances, yet takes no account of other normative considerations. What plausible theory of law could imply this structure?

11. Conclusion

A few basic principles of legal interpretation, which derive from difficult-to-dispute starting points, have powerful implications. They provide constraints that theories of interpretation must meet and a framework for evaluating such theories.