

## How To Think About Law as Morality: A Comment on Greenberg and Hershovitz

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### INTRODUCTION

In philosophy, we can sometimes hope to make progress just by looking at old issues in new ways. The hope is that we might see familiar facts and controversies differently and understand them better for it. In their recent Essays, Mark Greenberg and Scott Hershovitz make the case for such hope in jurisprudence: they argue that we can see the issues differently and understand them better for it. Greenberg and Hershovitz don't see things in exactly the same way, of course, but they effectively agree that we should view law *as* morality.<sup>1</sup> In other words, they effectively agree that we should understand legal rights and obligations (and other *legal facts*) as certain moral rights and obligations (and other *moral facts*) triggered by the actions of legal and political institutions.<sup>2</sup>

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1. See Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014); Scott Hershovitz, *The End of Jurisprudence*, 124 YALE L.J. 1160 (2015). Greenberg and Hershovitz are not the first to see law this way. Ronald Dworkin did too, at least in his final books. See RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 400-15 (2011); RONALD DWORKIN, *JUSTICE IN ROBES* 34-35 (2006). And there's some evidence that Dworkin understood law this way much earlier. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 49, 57-58, 87-89 (1977); Ronald Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 247, 256-60 (Marshall Cohen ed., 1983). But Dworkin claims that even *he* failed to keep that position in mind. DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra*, at 402.
  2. Two quick points: first, Greenberg and Hershovitz use the term "moral" in an inclusive sense. Moral facts so understood include genuine rights, responsibilities, powers, and reasons of all sorts (for example, those we have in virtue of our promises or friendships), and not merely those we have in virtue of (for example) being persons. This choice doesn't change the substance of their views, but it might make them seem strange to people who reserve "moral" for a proper subset of our genuine rights, responsibilities, powers, and reasons. Second, like Greenberg, I use the term "fact" in a lightweight sense, so that moral facts are just true claims (or the propositions expressed by true claims) about our rights, respon-

Greenberg and Hershovitz contend that the law-as-morality framework (as I'll call it) is more natural and familiar than it first seems. To understand this framework, we can start with the familiar idea that our particular reasons, rights, and obligations depend on our circumstances. For example, the crises we happen to experience affect the details of our obligations to provide aid; the goals that our spouses set affect what we should do to support their projects; and the promises that people make to us affect the details of our rights to make demands of them. The actions of legal and political institutions – which include, for example, legislative enactments, executive branch decisions, and judicial proceedings – are no different in this respect. These institutions have an almost unmatched power to shape our circumstances, so it's no surprise that their actions affect our reasons, rights, and obligations. Consider an example that even critics of the law-as-morality framework might accept. The actions of legal and political institutions affect traffic patterns, and traffic patterns affect our moral situation. For instance, given facts about our local traffic patterns, we have moral obligations not to accelerate through most red lights and not to tell children they can safely cross the street as soon as they've checked for cars on the right. So the idea that the actions of legal and political institutions affect our moral rights and obligations is familiar enough. Of course we also tend to think that the actions of legal and political institutions affect our *legal* rights and obligations. Greenberg and Hershovitz do too, but they propose a shift in perspective: they argue that what we ordinarily regard as legal rights and obligations are best understood as a certain subset of the moral rights and obligations affected by the actions of legal and political institutions.<sup>3</sup>

Greenberg and Hershovitz argue that there are advantages to adopting the law-as-morality framework. For example, both suggest that the theory explains what Dworkin and others call theoretical disagreement about the law.<sup>4</sup> Sometimes we disagree about the existence and content of our legal rights and obli-

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sibilities, powers, and reasons. See Mark Greenberg, *How Facts Make Law*, in *EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN* 225, 234 n.22 (Scott Hershovitz ed., 2006).

3. Consider a parallel case that might illuminate the shift in perspective that Greenberg and Hershovitz have in mind. We regard ourselves as having *familial* obligations, and we ask how our circumstances affect these obligations. But it is natural to think we should see familial obligations as moral obligations that we simply regard as familial in order to point out that they originate in our family relationships. In other words, it seems natural to say that the distinction we draw between familial obligations and other genuine obligations is a distinction we draw *within* morality (in the inclusive sense used here). The law-as-morality framework recommends that we see legal obligations in the same way. See Hershovitz, *supra* note 1, at 1037.
4. See, e.g., Greenberg, *supra* note 1, at 1340; Hershovitz, *supra* note 1, at 1194. For more about theoretical disagreements, see RONALD DWORKIN, *LAW'S EMPIRE* 4-6 (1986); SCOTT J. SHAPIRO, *LEGALITY* 282-306 (2011).

gations, even when we agree about what's been said and done by legal institutions in the past. One diagnosis is that we disagree in these cases because we disagree about the *legal significance* of the historical record.<sup>5</sup> For example, think about American constitutional law, where two parties might agree about the way some constitutional clause would have been understood in the eighteenth century, but disagree about whether that fact plays an important role in determining our legal rights and obligations. The law-as-morality framework seems to offer a straightforward explanation: if legal facts are moral facts, then it should be no surprise that people can and do have theoretical disagreements. After all, we often disagree about the existence and content of our moral rights, even when we agree about what's been said and done in the past.<sup>6</sup>

Greenberg and Hershovitz have much more to say about how and why to understand legal facts as moral facts, and I strongly recommend their Essays to anyone interested in jurisprudence. In this Response, however, I will focus on just one problem the law-as-morality framework must address. The problem, in short, is to explain the distinction that we ordinarily draw between legal facts and moral facts. We take ourselves to have moral rights and legal rights, moral obligations and legal obligations. But Greenberg and Hershovitz hold that legal rights and obligations simply are moral rights and obligations, and this seems to put them at odds with common sense. The challenge is to explain the common-sense distinction we draw between legal facts and moral facts without giving up the law-as-morality framework.

Consider an example that makes the problem more vivid. Imagine that the local legislature votes to implement a new traffic code and instructs other agencies to post and enforce lower speed limits. These actions will affect people's moral rights and obligations, but the effects will be diverse: they might include an obligation to drive more slowly; but they might also include an obligation to leave earlier for appointments or perhaps, in the extreme, to find work closer to home (if, for example, the longer commute interferes with important familial obligations). The basic law-as-morality framework holds that legal rights and obligations are the moral rights and obligations affected by the actions of

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5. See, e.g., Shapiro, *supra* note 4, at 287. I don't mean to suggest this is the only diagnosis in the literature.

6. One might argue that this explanation trades one problem for another. Most questions involving legal rights and obligations have relatively uncontroversial answers, and one might think that's incompatible with the claim that they are moral questions, since moral questions are rarely, if ever, relatively uncontroversial. In response, it's worth stressing that not all moral questions have controversial answers. This is especially true when it's agreed that the answer to a moral question turns on uncontroversial facts about what has been said or done. (For example, I have lived in places where chore wheels determine some of my moral responsibilities each week.) See, e.g., Greenberg, *supra* note 1, at 1337-1341.

legal and political institutions.<sup>7</sup> So the basic law-as-morality framework seems to recommend that we classify all the obligations resulting from the legislature's actions as legal obligations. That won't do, because it recommends conclusions (for example, that we would have a legal obligation to leave earlier for appointments) that we confidently reject. The problem for Greenberg and Hershovitz is to explain what distinguishes moral obligations that are legal from other moral obligations so that the law-as-morality framework recommends conclusions that better fit and explain our confident judgments about the legal facts.

Both Greenberg and Hershovitz attempt to meet the challenge. In this Response, I will explain and evaluate their attempts. In the next Part, I will explain Greenberg's attempt to solve the problem. Greenberg's proposal, in short, is to explain the conditions that set moral obligations that are legal apart from moral obligations that aren't. In effect, Greenberg characterizes a legal domain of morality that is meant to fit and explain our confident judgments about which sorts of rights and obligations are legal and which are "merely moral," to adopt Hershovitz's phrase.<sup>8</sup> Greenberg's approach to the challenge seems promising to me, but the specific conditions he defends do not. I will explain why and briefly outline an alternative that seems more promising. In the final Part, I will explain Hershovitz's response to the challenge. Hershovitz's response is similar to Greenberg's, but it comes with reservations. Like Greenberg, Hershovitz argues that we can explain our tendencies to regard certain moral rights and obligations as legal, and he employs similar strategies to explain particular cases. But Hershovitz has doubts about Greenberg's attempt to answer the challenge by characterizing *the* legal domain of morality—that is, by identifying the conditions that make moral obligations legal. I will explain why I think Hershovitz's doubts are premature.

## I. GREENBERG'S MORAL IMPACT THEORY

In this Part, I explain and evaluate Greenberg's account of the difference between legal obligations and other moral obligations. First, I explain Greenberg's attempt to distinguish legal obligations by their moral force and their source in our legal practices.<sup>9</sup> Second, I explain why I don't think Greenberg's account will work. Third, I outline a different account of the difference be-

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7. Greenberg, *supra* note 1, at 1306 ("The legal obligations are those moral obligations created by the actions of legal institutions").

8. Hershovitz, *supra* note 1, at 1188.

9. Greenberg focuses on how these conditions sort moral obligations, but he intends the discussion to generalize to cover moral rights, powers, and so on. See Greenberg, *supra* note 1, at 1308.

tween legal obligations and other moral obligations that seems more promising.

#### A. Greenberg's Account of Legal Obligation

Greenberg's account starts with the basic view I described above: "legal obligations," he writes, "are those moral obligations created by the actions of legal institutions."<sup>10</sup> But he adjusts his initial characterization in two ways.

First, Greenberg attempts to distinguish legal facts by their moral force: he suggests that moral facts are legal facts only if they are *all-things-considered* moral facts. Call this Greenberg's "force condition." He writes: "The relevant obligations—the ones that, according to my theory, are legal obligations—are simply *genuine, all-things-considered, practical* obligations" created by the actions of legal institutions.<sup>11</sup> On Greenberg's view, "an all-things-considered obligation is one that, taking all relevant considerations into account, one should fulfill."<sup>12</sup> The upshot is that moral obligations are legal obligations, on Greenberg's view, only if they are *decisive*.<sup>13</sup>

Second, Greenberg attempts to distinguish legal facts by their origin in the actions of legal and political institutions. Call this Greenberg's "source condition." The source condition has two parts, which he includes in response to distinct concerns about the basic view.

Greenberg's first concern is that his account will include too few legal obligations. In particular, Greenberg's concern is that the basic view can't explain legal obligations with the same content as certain moral obligations (for example, not to harm or kill), since the relevant moral obligations pre-exist the actions of legal and political institutions, and hence aren't *created* by them.<sup>14</sup> The worry, in other words, is that Greenberg's account would "have the consequence that some of what we take to be paradigmatic legal obligations, such as

10. Greenberg, *supra* note 1, at 1306.

11. *Id.* One note about this quotation: Greenberg says that legal obligations are "genuine" to make it clear he's not using "obligation" in the sociological sense—the sense in which a report that individuals or societies have certain obligations just means that individuals or societies take themselves to have certain obligations and act accordingly.

12. *Id.* at 1307.

13. Greenberg considers but rejects the idea that legal obligations are merely pro tanto moral obligations, which bear on what to do but don't by themselves settle the issue. But he rejects this tentatively. *Id.* at 1307 n.41. One goal I have in this section is to press Greenberg to reconsider. The alternative I outline below is similar to the view that legal obligations simply are certain pro tanto moral obligations. As I explain, however, I don't think it's best to sort them out by their moral force.

14. Greenberg, *supra* note 1, at 1319–1321.

the obligation not to kill, are not legal obligations at all.”<sup>15</sup> In response to this worry, Greenberg relaxes the required connection between the actions of legal and political institutions, on the one hand, and the resulting moral facts, on the other. It’s enough, Greenberg argues, if our moral obligations are *affected* by our community’s legal and political history.<sup>16</sup> For instance, we have preexisting moral obligations not to drive impaired, but the content of these obligations is somewhat imprecise. Greenberg’s thought is that the actions of a community’s legal and political institutions might make the content of these preexisting obligations more precise. Suppose, for instance, that the legislature, after careful study, decides to prohibit anyone from driving with a blood alcohol level above 0.8%. The legislature’s decision might affect the content of our preexisting obligations, in the sense that its decision triggers a more precise obligation that is explained, in part, by the preexisting obligations.<sup>17</sup> Because the legislature’s decision has a relevant moral effect, Greenberg suggests, we can classify the resulting obligation as legal.

Greenberg’s second concern is that his account will include far too many legal obligations. His basic account regards all the moral obligations affected by the actions of legal and political institutions as legal obligations.<sup>18</sup> But this sweeps in too much. Greenberg focuses his attention on what he calls “paradoxical” moral obligations generated by the actions of legal and political institutions, which might include obligations to vote the bums out, to protest, to resist, or perhaps to simply flee.<sup>19</sup> But Greenberg must also consider what I will call “incidental” moral obligations generated by the actions of legal and political institutions, though I do not mean to suggest these moral obligations will be unimportant. For example, the class of incidental moral obligations will include the obligation to leave earlier for appointments that we identified when we imagined the local legislature acting to implement a new traffic code.<sup>20</sup> But

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15. *Id.* at 1320.

16. *Id.* 1320–21. Greenberg includes obligations that are “altered” and those that are “reinforced” by the actions of legal institutions. I use the term “affected” to cover obligations that are created, altered, or reinforced by the actions of legal institutions.

17. *Id.* at 1320 n.66 (clarifying the sense in which the content of the preexisting obligation is affected, which is that the pre-legal obligation is part of the explanation of the new, more precise obligation).

18. *Id.* at 1306.

19. *Id.* at 1322.

20. One might be tempted to call incidental moral obligations *derivative*, and think they are explained by changes to our legal obligations, which are explained by actions of legal institutions. But that can’t be right, at least not all the time. Take the traffic code example again. I can notice the resulting traffic and enforcement patterns and conclude that I’m obligated to leave earlier for my appointments without taking a position on whether the legislature’s actions have changed my legal obligations or merely affected descriptive facts that are relevant to how I must act if I’m to keep my appointments.

the category includes much else. Greenberg considers what happens when the legislature merely *suggests* a solution to a coordination problem that, by making the solution salient, leads to a moral obligation to adopt it.<sup>21</sup> And Hershovitz asks what we should think when the legislature enacts whistleblower protection statutes that, by providing a new option (to blow the whistle with legal protection), make coming forward with information obligatory, not supererogatory.<sup>22</sup> In response to these concerns, Greenberg argues that legal obligations aren't just any moral obligations created by the actions of legal and political institutions: moral obligations are legal obligations only if they are created by the actions of legal and political institutions "in the legally proper way."<sup>23</sup> Greenberg's thought is that paradoxical and incidental moral obligation don't trace to the actions of legal institutions in the proper way, and therefore aren't legal obligations.<sup>24</sup> For example, he argues that, by their nature, legal systems are supposed to improve the moral situation—given this, when the actions of legal institutions make the moral situation worse, the resulting obligations to fix the moral situation won't be legal obligations.<sup>25</sup> Greenberg acknowledges that this condition won't cover all the cases, and he regards the account as a work in progress.<sup>26</sup> But Greenberg seems to put its finger on the kind of account we need. The intuitively correct response to cases of paradoxical and incidental ob-

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21. Greenberg, *supra* note 1, at 1323 n.72.

22. Hershovitz, *supra* note 1, at 1200 n.83.

23. Greenberg, *supra* note 1, at 1321-23. Greenberg doesn't explicitly discuss examples of incidental moral obligations. He discusses paradoxical obligations, but he makes it clear that they are only one example, and not the only kind of non-legal obligation his account must sort out. *See id.* at 1323. ("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*.")

24. Greenberg isn't quite clear about how we should understand this suggestion. In some places, Greenberg talks as if *actions* can be legally proper or not. *See, e.g., id.* at 1322 ("[A] method that relies on creating reasons to undo what the institution has wrought is a defective way of generating obligations."); *id.* at 1323 n.72 ("[A]n institution that explicitly purports not to be generating binding obligations is not acting in the legally proper way."). Understood this way, however, Greenberg's account won't be sufficient. Even when legal institutions are acting in the legally proper way (whatever that turns out to be), they will affect countless incidental moral facts. In other places, Greenberg talks as if moral explanations (and, by extension, the moral properties and relations they detail) can be legally proper or not. Greenberg talks about the way obligations come about, and seems to suggest that those that are explained in certain ways (for example, by citing the fact that the legal system made the moral situation worse) aren't legal obligations. I have this second understanding in mind in what follows.

25. Greenberg, *supra*, note 1, at 1321-23.

26. *Id.* at 1323 ("But I do not have a complete account of the legally proper way; further work is needed.").

ligations does seem to be: sure, those are moral consequences of legal action, but not the right sort.

In the end, then, Greenberg's considered view is as follows: a community's legal facts are just those *all-things-considered* moral facts *affected* by the actions of its legal and political institutions *in the legally proper way*.<sup>27</sup> These conditions characterize a set of moral facts, which we can think of as a legal domain of morality—if Greenberg is right, it's the domain of morality that fits our confident judgments of the legal facts and explains what they are judgments of.

### B. Some Doubts About Greenberg's Account

In this section, I will offer reasons to think Greenberg's account of legal obligation won't work. I will focus on Greenberg's force condition, but I will voice some concerns about the source condition too.

The problem with Greenberg's force condition is straightforward: this condition seems to imply that we have many fewer legal obligations than we ordinarily think, or that the legal obligations we have are much stronger than we ordinarily think.<sup>28</sup> We ordinarily think that legal obligations can conflict with other obligations. Greenberg's view doesn't rule out such conflicts, at least not entirely. He allows that we can face conflicts between legal obligations and other pro tanto obligations. But part of what we ordinarily think, I take it, is that we can face conflicts between legal obligations and other obligations where the right thing to do is to fulfill our non-legal obligations. (Or more broadly, we can face situations where the right thing to do is something other than what we're legally obligated to do.) Greenberg's view rules this out. He holds that legal obligations are all-things-considered moral obligations, and that all-things-considered moral obligations settle the question of what to do. It can only *appear* that the thing to do is to violate a legal obligation: in reality, either we have no legal obligation, or the thing to do is to fulfill it.

Does this conflict with common sense? It certainly seems to. Suppose that you are the only coach of your child's soccer team, and you have a game this afternoon. You left for your team's game at a responsible time, but ran into terrible traffic. You arrive with just minutes to spare and frantically look for a parking space. You find what seems like an open space but a city sign clearly says: "No parking." You draw the conclusion we all draw: that you have a legal obligation not to park there. You take everything into account: is parking there

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27. *Id.* at 1321 n.69, 1323.

28. Similar problems arise when we try to apply the force condition to legal powers, privileges, permissions, and so on. *See id.* at 1308. There are different ways to spell out what it would be to have an all-things-considered power, privilege, or permission, but all of them seem to have comparably implausible implications.

the best thing to do, despite your legal obligation not to? I'm inclined to think it is, though of course you're on the hook for a ticket, perhaps worse.<sup>29</sup> And this is a case where the moral stakes are relatively low. We can imagine cases involving more serious moral concerns. Suppose, for example, that you must trespass to reach someone drowning in a private pond; or that your cancer-stricken mother asks you to buy her cannabis in order to deal with the nausea caused by chemotherapy; or even that you must violate one legal obligation (for example, to pay the credit card bill) in order to fulfill another (for example, to pay the gas bill so your children have a warm place to sleep). It seems clear that in these cases—or in some cases like them—we face situations where we should violate at least one of our legal obligations in the name of competing moral obligations or concerns. Greenberg's view doesn't let him describe the cases this way: he must say that our moral responses are misguided, or that these aren't cases where we have the relevant legal obligations at all.<sup>30</sup>

And particular cases aren't the only problem for Greenberg's force condition. This condition would also seem to require us to revise the way we think about legal obligation in general. Consider two quick examples. First, the force condition seems to imply that we are morally required to obey the law, since it holds that our legal obligations simply are all-things-considered moral obligations, and we are morally required (I assume) to obey our all-things-considered moral obligations. If so, then Greenberg's force condition either puts him at odds with the widely held view that there is no general moral obligation to obey the law, or it requires him to understand the question in a different way (for example, to interpret the question as whether there is a general

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29. To be more careful: I think there are some cases like this case where parking illegally is the thing to do. This idea that you seem *answerable* to the law for parking there is a point to which I return below. Here I invoke the idea to make two points: first, that being answerable to the law doesn't always settle what to do; and second, that because you're still answerable to the law, it's hard to accept that you had no legal obligation not to park there.

30. Greenberg might respond that these are cases where your actions are illegal, but not cases where you violate your legal obligations. He might say something like: a standard is a legal standard just in case it's a standard that legal institutions have the standing to hold you to, and that an act is illegal just in case a legal standard doesn't allow it. Greenberg might then say we have legal obligations only when the fact that some act is illegal is decisive. In substance, this is close to the view I outline below. But I see several reasons not to describe the underlying facts this way. First, many people I've talked to reject part of the distinction and think claims about illegality entail claims about legal obligation. Second, there's pressure to make room for non-decisive legal obligations from another direction. Suppose that keeping my children fed and clothed requires me to violate my legal obligation to pay my mortgage today. If so, the thing to do is to ignore my legal obligation and use the money to take care of my children. But we would hesitate to describe what I've done as illegal. The upshot seems to be that we really do think there are legal obligations that aren't all-things-considered obligations in Greenberg's sense.

moral obligation to obey what the legislature puts forward as law).<sup>31</sup> Second, and in a similar way, the force condition seems incompatible with the most straightforward account of civil disobedience – after all, if civil disobedients are right about their reasons, then they might have no genuine legal obligations to violate.<sup>32</sup>

My point is not that Greenberg has nothing to say in response, or that his responses could not be plausible. My point is only that Greenberg's force condition recommends judgments that we intuitively reject, and this comes at some cost to his account of legal obligations, especially since the charge is that the law-as-morality framework fails to fit and explain what we ordinarily think.<sup>33</sup> Suppose for now that Greenberg should drop the force condition. Where would that leave his account of legal obligation? The most straightforward response would be to drop the force condition and keep the source condition. The resulting account would be that legal obligations are the moral obligations (whether pro tanto or all-things-considered) affected by the actions of

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31. Greenberg acknowledges that the consensus view holds that there is no obligation to obey the law. See Greenberg, *Moral Impact*, *supra* note 1, at 1314, 1318; Mark Greenberg, *The Standard Picture and Its Discontents*, in *OXFORD STUDIES IN PHILOSOPHY OF LAW* 39, 99-101 (Leslie Green & Brian Leiter eds., 2011). But he seems to reinterpret the question in exactly the way I suggest. *Id.* at 1314 (“[T]here is no general moral obligation to obey directives from legal authorities.”). One much cited argument for the conclusion that there is no general obligation to obey the law is M.B.E. Smith's, which presents the question as whether we have a general moral obligation to do what's legally required. M.B.E. Smith, *Is There a Prima Facie Obligation To Obey the Law?*, 82 *YALE L.J.* 950, 952 (1973). There are both interpretive and substantive issues to sort out before these points present any insurmountable challenge. I only want to draw attention to what Greenberg's view requires him to say, since it's at odds with the way that many people understand these questions.
32. Cf. Liam Murphy, *Better To See Law This Way*, 83 *N.Y.U. L. REV.* 1088, 1107 (2008) (arguing that it would be “ridiculous to propose that, properly understood, there are no crimes”).
33. Might there be some reason to accept the force condition despite its costs? In different places, Greenberg suggests that the force condition might help us explain why it is generally morally permissible for the state to coercively enforce its citizens' legal obligations, Greenberg, *supra* note 31, at 85 n.52; why the state is correct to regard its citizens' legal obligations as decisive, Greenberg, *supra* note 1, at 1304; and why familiar legal and political institutions are able to ensure that the legal obligations they create are often morally binding, Greenberg, *supra* note 31, at 84-95. He also claims that many familiar legal systems are not radically defective (in this respect). See *id.* at 101 (rejecting a view that implies that the law can't reliably do what it's supposed to do). The arguments from these observations to the force condition deserve more discussion than space allows. But my basic objection is that none of these observations, even if true, provides adequate support to the force condition. We can account for the fact that, in general, legal obligations are decisive without supposing that legal obligations must be. In fact, the force condition seems to explain too much: it leaves no room for the exceptions that “in general” suggests.

legal and political institutions in the legally proper way. In fact, Greenberg already indicates that this is his fallback position.<sup>34</sup>

I find this view more promising, but I have two related concerns. First, I worry that the source condition doesn't really explain what legal obligations have in common or what distinguishes them from other moral obligations. (At worst, the source condition comes closer to naming the problem than solving it.) This charge isn't completely fair, of course, because Greenberg stresses that the account is a work in progress, and he might yet show that our questions and disputes about legal obligations are best construed as questions and disputes about moral obligations that have arisen in the proper way, whatever that turns out to be. So I won't press the point about the source condition as it now stands. Second, and more important, however, I worry that the filled-in account will be lacking in a similar way. Consider some cases we've seen that an adequate source condition will need to sort and explain: an obligation to vote the bums out or protest government action; an obligation, given the new traffic patterns, to leave earlier for appointments or to live closer to work or to reinstruct your children on how to safely navigate the streets; an obligation, given that you have legal protection, to blow the whistle on your employer; and an obligation, given the state's recommendation and the way others have responded to it, to adopt a solution to some coordination problem. These cases hint at the diverse ways that the actions of legal institutions can result in obligations that clearly aren't legal. And it's not obvious to me that the reason they aren't legal obligations is that they didn't arise in the proper way, unless that just means that they didn't arise in a way that makes them legal obligations. But suppose I waive that concern, and grant that, in each case, the relevant obligation didn't trace to the actions of legal institutions in the right way. Even then, I worry that it will be hard to develop criteria of legal properness that hang together in a theoretically appealing way.<sup>35</sup>

I don't want to lean too hard on these criticisms because I'm not yet certain they'll bear the weight. But I turn now to putting a different sort of pressure on Greenberg to defend his account. My strategy is to outline a different way to think about legal obligation within the law-as-morality framework, one that seems more promising.

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34. Greenberg, *supra* note 1, at 1307 n.41 ("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.").

35. Hershovitz shares this concern. See Hershovitz, *supra* note 1, at 1200 n.83 ("I worry that the impact of our legal practices on our moral right and obligations is so widespread and varied that it will be difficult to develop criteria that do not seem ad hoc.").

### C. Another Way To Think About Legal Obligations

The view that I will outline in this section holds that what sets legal obligations apart from other moral obligations are the distinctive liabilities we incur for violating them. To a first approximation, the view is that legal obligations are moral obligations that legal institutions have the moral standing to hold us to. I will call this the “legal liability condition,” but keep in mind that it refers to a *moral* (that is, genuine normative) liability to certain responses from *legal* institutions. To see the condition’s appeal, think again about a local legislature’s decision to adopt and enforce a new traffic code. The legal liability condition promises to capture one key difference between the resulting obligation to observe the posted speed and the resulting obligation to leave earlier for appointments. The local legal institutions—through the police—have the moral standing, or authority, to hold us to the posted speed, but not to our lunch plans. That, anyway, is the basic idea. In the rest of the section, I will explain this approach to the law-as-morality framework in somewhat more detail. If the view is as promising as it seems, then the challenge to Greenberg is sharper: he must not only show that the force and source conditions are defensible, but also that they are superior the legal liability condition.

Let’s take one step back. Our legal practice—the practice of making, interpreting, disputing, and implementing the law—involves questions and competing claims about the exact distribution of legal obligations, rights, powers, and immunities. In other words, a central part of the practice involves moral notions like “right” and “obligation.” In a way, Greenberg’s insight—shared by other law-as-morality proponents—is to take this part of legal practice at face value, or near enough. Greenberg argues, in effect, that legal rights and obligations could in fact be what they seem: moral rights and obligations with a special connection to and relevance for legal practice. To make the case, Greenberg stresses the source and force of some of our moral obligations. These don’t seem to be the right points to stress, for the reasons I’ve given. But Greenberg might have tried to make the case by stressing a point about the moral notions involved. One standard view (though not the only possible one) about notions like “right” and “obligation,” but especially about “power” and “immunity,” is that they are fundamentally relational: they refer to constituent parts of the moral relationships individuals stand in to one another.<sup>36</sup> To fully characterize the moral facts, on this sort of view, we would have to characterize the complex

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36. See, e.g., Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917).

web of moral relationships that individuals stand in to one another.<sup>37</sup> So if legal facts simply were certain moral facts, as we're supposing, then to fully characterize the legal facts, we would have to characterize part of the complex web of moral relationships that individuals stand in to one another.

This suggests an alternative approach to characterizing a legal domain of morality. Legal facts are moral facts, we might say, but they are primarily distinguished from other moral facts by the particular sort of moral relationships in which they figure, not by their practical force or their source in our legal practice. Here's a working hypothesis: legal facts are moral facts that figure in the moral relationship between a community's legal and political institutions and the community's individual members.<sup>38</sup> Let's think about how this hypothesis might apply to legal obligation. One way to understand obligation is by its connection to *accountability* or *answerability*.<sup>39</sup> Obligatory actions are those we are accountable to others (including ourselves and perhaps everyone) for performing, and this sets them apart from actions that are only recommended (no matter how strongly). We might distinguish our legal obligations, then, as those moral obligations that legal institutions have the distinctive standing to hold us to, a standing that characteristically involves the standing to impose sanctions.<sup>40</sup>

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37. That might not be all we need to do. One open question is whether morality recommends more than it demands. If it does, then we would also need to account for these other moral facts.

38. This seems to call for an account of legal and political institutions. This issue deserves more discussion than I can give it here. For now, I will echo Greenberg's comment that the question of which institutions are legal is actually *less* important on the law-as-morality framework, since we could ask the questions by saying: what effect do the actions of *those* institutions (pointing) have our moral rights and obligations. See Greenberg, *supra* note 1, at 1323-1335 and especially at 1323 n.73. And I will echo Hershovitz's comment that we don't need an account of legal institutions to get started: we more or less know which institutions to point at. See Hershovitz, *supra* note 1, at 1203 n.93. But there is much more to be said about this.

39. My thinking about these issues has been helped and influenced by Stephen Darwall's account of these moral relationships in terms of "second personal" notions like standing to make demands and answerability. See STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006). Darwall's brief application of these ideas to the law has special relevance. See STEPHEN DARWALL, *MORALITY, AUTHORITY, AND LAW: ESSAYS IN SECOND-PERSONAL ETHICS* at I (2013). The big difference is that Darwall doesn't take a stand on the question of whether legal obligations simply are certain moral obligations or whether they merely "purport" to be. *Id.* at 86, 172. In contrast, the current proposal is a version of the hypothesis that legal facts simply are certain moral facts.

40. Dworkin outlined a position like this, though he emphasized legal rights not legal obligations. He suggested that legal rights are "rights . . . that people are entitled to enforce on demand . . . in adjudicative institutions." DWORCKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 1, at 406. Greenberg argues that Dworkin's position won't work, and one might worry that his arguments will affect my position too. Greenberg writes that a serious problem with the position is that it "rule[s] out in principle the possibility of legal obligations that the courts

So far, this puts the view in terms of the characteristic powers (that is, the standing to hold to account) that figure in the moral relationship between a community's legal and political institutions and its members. We can also put it in terms of the characteristic liabilities involved. That is, we can say that legal obligations are distinguished from other obligations by the liabilities we incur for failing to fulfill them: specifically, they make us liable to certain responses from the legal institutions themselves. That is the crux of what I called the legal liability condition. Roughly put, it holds that the legal domain of morality is defined by the standards that we are answerable to our community's legal institutions for meeting. I don't mean to suggest that the legal liability condition will be easy to spell out—I don't think it will be.<sup>41</sup> But I think the general approach has some promising features.

First, the legal liability condition doesn't imply Greenberg's thesis that legal obligations must be decisive. On the legal liability approach, the question of my *having* an obligation to you is a moral question, to be sure, but a question about the structure of our moral relationship. Roughly put: do you have the standing to hold me accountable for acting a certain way? The question of what moral force this fact has is a further moral question. So this approach to distinguishing law from morality would enable us to separate the question of what

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and similar institutions . . . should not enforce." Greenberg, *supra* note 1, at 1299–1300 n.28. Greenberg points out that this is at odds with the familiar idea that elected officials have legal obligations that courts should decline to enforce for various reasons. *Id.* I don't find this objection compelling. The basic reason is that Greenberg interprets Dworkin's claims about what's *enforceable* as claims about what *should be enforced*. This seems like a mistake. A claim about enforceability is more naturally interpreted as a claim about what may be enforced in principle—or as I put it, what the legal institutions have the *standing* to enforce. But then we can make sense of the idea that courts should not enforce every obligation that they have the standing to enforce. We quickly learn in life that there are often good reasons to demand less than we have the standing to demand. Courts might learn there are reasons to opt not to enforce the obligations that they have the standing to enforce. Whether or not this is the right response on behalf of Dworkin's view, I think these considerations explain why Greenberg's objection won't carry over to the view I outlined.

41. Let me flag one issue right away. So far, I've spoken as if the distinctive liability is a liability to an account-seeking response from legal institutions. But this gloss doesn't adequately fit private law obligations, where one is liable to be held to account by the wronged party, which needn't be (and usually isn't) a legal institution. There are ways to develop the legal liability condition in response to this worry. For example, I'm tempted by the view that legal obligations are distinguished from other moral obligations by the liability to be held to account through legal processes that they involve. This view promises to capture what criminal law and private law obligations have in common (a liability to be held to account through a process supervised by an institution like a court) and leave room for what distinguishes them (in terms, for example, of where normative control of the process lies). This is just one idea in response to one *prima facie* challenge to the legal liability condition. There is of course much more to be said.

the legal facts are from the question of their force.<sup>42</sup> Given this, the legal liability condition promises to explain cases involving moral emergencies in a way that better fits with what we ordinarily think about them. Consider, for example, the case where I'm late for the youth soccer game I've promised to coach and decide to park illegally. I have a legal obligation not to park there, in the sense that the police have the standing to demand that I don't and to ticket me if I do. But this doesn't automatically exclude my having enough reason to park there.<sup>43</sup>

Second, the legal liability condition promises to explain the phenomena Greenberg puts forward to motivate the claim that legal obligations must arise "in the legally proper way."<sup>44</sup> The first of these problems, recall, involves legal obligations that seem redundant because their content coincides with the content of preexisting moral obligations. The legal liability condition can accommodate our intuition that the actions of legal and political institutions aren't idle: they succeed in generating non-redundant content, because they succeed in generating non-redundant moral liabilities. This might sound strange. But it's a familiar enough idea that we can make ourselves *newly* accountable for acting in ways that we are *already* accountable for acting.<sup>45</sup> I might promise my partner that I'll exercise more often and then later promise my mom the same thing.

The second of these problems involves "paradoxical" and "incidental" moral obligations. The problem, recall, is that the actions of legal and political institutions bring about many moral obligations—including, perhaps, obligations to resist or flee, and obligations to leave earlier for appointments—that couldn't plausibly be legal obligations. The legal liability condition seems to identify why these sorts of obligations won't count as legal obligations. The *legal* obligations, roughly put, are the obligations that legal institutions have the distinctive standing to hold us accountable for fulfilling. Any obligations we have to resist or flee wicked legal institutions won't have this feature. (I can change your moral obligations by attacking you, but it seems obvious that I won't have any standing to hold you to the resulting obligations.) And the legal liability also seems to identify why incidental obligations aren't legal obligations: legislative actions might affect the way I'm obligated to drive and when I'm obligated to leave for appointments, but violating the resulting obli-

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42. This point echoes a point in *Law's Empire*. See DWORKIN, *supra* note 4, at 108-13.

43. I think these points carry over to the other cases I discussed (involving conflicts between moral and legal obligations, or between legal obligations).

44. Greenberg *supra* note 1, at 1323.

45. Scott Hershovitz makes a similar point about "redundant" legal obligations. See Scott Hershovitz, *The Authority of Law*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 65 (Andrei Marmor ed., 2012).

gations involves different moral consequences, and that's how we can distinguish my legal obligation to observe the posted speed from my merely moral obligation to leave early enough to keep my appointments.

My aim with these brief remarks is to offer a glimpse into yet another way to see law as morality, one with evident appeal.<sup>46</sup> But one effect of these remarks is to sharpen a potential challenge to Greenberg's view. A defense of Greenberg needn't only show that his view scores better than I've given it credit for; it also needs to show that it scores better than the alternatives.

## II. HERSHOVITZ'S ALTERNATIVE

Greenberg and I agree that law is best seen as part of morality, but we disagree about which part. Greenberg proposes that we see law as the binding part of morality triggered by the actions of legal and political institutions in the legally proper way. In response, I have argued that Greenberg's proposal doesn't fit what we tend to think about the law. And I have proposed that we might instead see law as the part of morality that courts and other legal institutions have the moral standing to hold us to. My proposal, once spelled out, might prove to be more successful than Greenberg's, or it might not.

But let's ask another question: why have this dispute with Greenberg at all? At the outset, I suggested that what justified the effort was the need to make sense of certain familiar ideas within the law-as-morality framework. We ordinarily take there to be something distinct from morality, whether the law or the content of the law, and we ask what it requires or allows. In effect, Greenberg attempts to show that our familiar ideas are correct, if not quite in the way we might have thought. That is, Greenberg attempts to show that the law-as-

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46. I want to make sure I don't overstate the significance of the legal liability alternative I've outlined. It's a theory about *what* legal obligations are—that they are distinguished from other obligations by the powers and liabilities they involve. The hope is that this theory accurately captures the key difference between the obligations we confidently regard as legal and those we don't. But the legal liability condition still leaves much to be explained: for instance, it doesn't tell us whether we have any legal obligations or why. Take the traffic code example. The claim is that the legal liability condition identifies the relevant difference between the obligation to observe the posted speed and the obligation to leave earlier. But this isn't yet to *explain* why the legislature's decision to adopt a new traffic code changes the government's moral relationship to you with respect to your driving but not your lunch plans. Nor does it explain how this fact about your moral relationship to the government should figure in your thinking about what to do. So the legal liability condition doesn't displace questions about how and why the actions of legal institutions affect our legal obligations or questions about their moral force. Some of what Greenberg says about "the legally proper way" might be incorporated into a substantive moral explanation of when the actions of legal institutions succeed in generating certain moral liabilities. But that doesn't undermine the claim that questions about the legal domain are best understood as moral questions about the government's relationship to its citizens.

morality framework can and should vindicate the idea that there is something that answers to our ordinary thoughts about the content of the law. The law-as-morality framework simply holds that the something—the content of the law—is a characteristic subset of morality.

Scott Hershovitz has concerns about developing the law-as-morality framework this way.<sup>47</sup> Like Greenberg, Hershovitz endorses the central claim of the law-as-morality framework, that questions about what the law requires of us or entitles us to are best understood as questions about the moral effects of the actions of legal and political institutions. But Hershovitz doesn't think this insight should lead us to refurbish and vindicate the idea that there is something—the law's content—that's distinct from morality. Instead, he argues, it should lead us to leave the idea behind entirely.<sup>48</sup>

Let's grant that we *could* leave it behind. After all, Greenberg should agree that we could ask and answer all the underlying moral questions without asking which are best regarded as legal—that is, we could figure out morality's content without asking which parts are properly included in the content of the law.<sup>49</sup> So the question is whether we *should* leave the idea behind. Hershovitz says yes. He argues that there are reasons to think law-as-morality proponents can't vindicate the notion of the law's content, and reasons to doubt they should even if they could.

#### A. *Is Greenberg's Project Based on a Mistake?*

First, Hershovitz argues that the attempt to vindicate the idea of the content of the law by characterizing a legal domain of morality rests on a mistake, because it misunderstands the nature and significance of the distinction we draw between law and morality.<sup>50</sup> This attempt assumes that the distinction we draw between legal facts and moral facts is systematic, in the sense that it tracks the same conditions every time it's drawn correctly.<sup>51</sup> But Hershovitz

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47. *Id.* at 56 (“I want to see if I can explain what makes me reluctant to frame the task of jurisprudence as Greenberg does.”).

48. Hershovitz recognizes that we distinguish law from morality, of course, and he accepts the burden of explaining these distinctions within the law-as-morality framework. But Hershovitz denies that an adequate explanation must appeal to criteria that sort obligations into sets of legal and moral obligations. Instead, Hershovitz takes a pragmatic approach to explaining why, in various cases, it's useful to mark some moral obligations as legal. *See* Hershovitz, *supra* note 1, at 1186–92.

49. Greenberg, *supra* note 1, at 1323 n.73.

50. Hershovitz, *supra* note 1, at 1201–02.

51. To be clear, the idea is that legal obligations always satisfy certain “formal” conditions, not certain “substantive” conditions. The hope is to characterize what's at issue in a disagreement about legal obligations.

thinks we should reject this assumption, or at least that we have strong reasons to doubt it. He argues that, if you look closely, we often draw different distinctions between law and morality, and for different purposes. So it's a mistake to try to characterize "the" distinction between law and morality.<sup>52</sup>

I will return to Hershovitz's arguments below, but first consider a case where his position seems right. We regard some of our obligations as "work obligations," but it seems like a mistake to read too much into the distinction between work obligations and other obligations, since we likely draw that distinction in different ways to make different points. In some cases, as when our concern is to keep our jobs, we might distinguish our work obligations from other obligations by the fact that our bosses have the standing to hold us to them. But other concerns might lead us to draw different distinctions. For example, suppose you promise a work friend that you'll attend the optional holiday party. Your boss won't regard the resulting obligation as one of your work obligations. But you might regard it as such, especially if you only need to explain the general source of the obligation (for example, because you need to explain to non-work friends why you have to decline their invitation to be elsewhere that night). Then again, you might not (for example, if your non-work friends press you, you might clarify that it's not something that might get you fired, but something you're committed to all the same). But the underlying moral facts are the same, and it seems unmotivated to insist that there's a privileged way to describe them. At the very least, it seems like we need good reason to think there is.

Hershovitz suspects the situation is the same in law: just as we characterize different "work domains" of morality, so too do we characterize different legal domains. In other words, Hershovitz suspects that we use "legal" to stress different sets of obligations for different purposes: sometimes we use the label to stress the source of our obligations, other times to stress the liabilities we face, and still other times to stress the point that these obligations don't exhaust our moral responsibilities.<sup>53</sup> And Hershovitz argues that individuals who occupy different roles regard—and should regard—different sets of rights and obligations as legal.<sup>54</sup> For example, we might regard judges as having legal obligations even when they can't be made to answer for their conduct. When we focus on ordinary citizens, however, we might draw the boundary more strictly and include only those obligations that involve certain liabilities. If Hershovitz is right, then perhaps Greenberg and I simply draw different distinctions to stress different points. But then we don't (or need not) disagree, since we can agree about how to distinguish legal obligations from moral obligations once

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52. Hershovitz, *supra* note 1, at 1186–92, 1200–02.

53. *Id.*

54. *Id.* at 1053 n.91.

we have a concern in mind. And it seems unmotivated to insist that there's a privileged concern to have. At the very least, it seems like we need a good reason to think there is.

I think the best response to Hershovitz's doubts, given the early stage of the debate, is to make the case for cautious optimism. Hershovitz might be right that we distinguish legal obligations from other obligations in a pragmatic and flexible way, and hence he might be right about how to develop the law-as-morality framework, but I don't think we should give up on the boundary-drawing project too quickly. The basic reason for optimism is that our practice of making and disputing claims of legal obligation is more robust and (looks to be) more systematic than our practice of making and disputing claims of work obligation—in other words, we seem to distinguish legal obligations from other obligations in a more disciplined and principled way.<sup>55</sup> Given this, careful attention to the way we ordinarily draw the distinction might yet support Greenberg's thesis that we're concerned with a particular class of moral obligations, whose general features we might explain. Then again, careful attention to the data might support Hershovitz's view. But I don't think the examples we have seen settle the question either way.<sup>56</sup> And it's worth stressing that Greenberg's attempt to vindicate the notion of the content of the law might survive a counterexample or two. It could turn out that disputes about legal obligation are best understood as disputes about a particular kind of moral obligation in all but a few cases. In that case, we might succeed in characterizing the *central* distinction we draw between law and morality, and we might offer partial vindication of our ordinary ways of thinking in the process.<sup>57</sup> So I think we should

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55. Of course, Hershovitz need not claim that the distinction we draw between legal obligations and other obligations is no more disciplined than the distinction we draw between work obligations and other obligations.

56. For example, Hershovitz imagines a case where a gay couple approaches the local clerk's office and claims a legal right to a marriage license. *See* Hershovitz, *supra* note 1, at 1203 n.91. It's easy to imagine the clerk and a judge reaching different conclusions about whether the couple has a right to the license. Hershovitz asks if we must then interpret the clerk and the judge as disagreeing about whether certain criteria—the criteria that set off the legal domain of morality—are met. Hershovitz has doubts: he thinks it's better to interpret them as using "legal" to track different distinctions. But he doesn't think he can rule out the alternative description: that one party gets the legal issue wrong, even though she *misuses* "legal" to track some other important distinction. So the particular example is compatible with both views. If we looked at enough examples, Hershovitz might convince us that there's no one distinction in play. And that's precisely the kind of cumulative evidence I'd like to see. In the meantime, I remain optimistic that there is (at least) a central distinction in play in these cases.

57. One might think that philosophical accounts of familiar concepts rarely achieve more. Consider analogous attempts to characterize the distinction between narrowly moral rights, obligations, and reasons and other genuine normative rights, obligations, and reasons. *See, e.g.,* T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 171-77 (1998). The projects focus on central cases, and thus tolerate some deviation from our ordinary ways of characterizing the

regard the jury as out on the question of whether we can vindicate the notion of the content of the law by characterizing a legal domain of morality.

*B. Is Greenberg's Project Worth Doing?*

But let's turn to Hershovitz's second argument, for thinking we should move on even if we could vindicate notions like the content of the law. Hershovitz argues, in short, that there aren't good reasons to pursue this vindicatory law-as-morality framework, and several good reasons not to. Hershovitz doubts there are good reasons to pursue Greenberg's vindicatory approach because he doubts that concepts like the content of the law play a sufficiently important role in our thinking. Hershovitz writes: "The thought that there is an existing body of law that comprises all the legal rights, obligations, privileges, and powers in force in a legal system plays no role in legal practice."<sup>58</sup> Lawyers, that is, take no special interest in the content of the law: "Rather, they read records of their community's legal history . . . and then they construct arguments about what obligations people have as a result."<sup>59</sup> Hershovitz's suggestion, I think, is that there is pressure to vindicate ways of thinking only when they play some valuable role in our practice. The challenge, then, is to explain why notions like the content of the law are sufficiently valuable to incorporate into the law-as-morality framework.

I think this challenge might be met. Here's one possibility I find tempting, though I won't pursue it at length here. The thought is that it might be useful to talk about the law's content because doing so enables us to better track an entire dimension of our moral lives. On Greenberg's picture, we discover our legal obligations by looking to the facts about what our community's legal institutions have said and done and figuring out their moral consequences. Greenberg then adds that the content of the law includes all the relevant obligations, rights, powers, and immunities that we discover. Hershovitz wonders what the point of the addition is.<sup>60</sup> I think Hershovitz's complaint would have more bite if we only had to worry about the moral consequences of what legal institutions have done. But of course that's only part of what we worry about when we worry about our moral situation. We also have to ask how our promises, our families and friendships, our jobs, and our religions contribute to our moral situation. But this still leaves us with questions about what to do in the

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distinction between narrowly moral considerations and other practical normative considerations.

58. Hershovitz, *supra* note 1, at 1202.

59. *Id.*

60. Hershovitz, *supra* note 1, at 1202 ("And though we could make the picture [of existing law] more sophisticated, there is little return to doing so.").

end, and the outputs of our earlier moral inquiries (for example into our promissory obligations) might serve as inputs to this one. And at this stage, moral categories (for example, the law, the house rules, and so on) serve a useful purpose, both as a way to keep track of the relevant considerations, and as a way to pose the question of whether, say, legal obligations *as a category* should have any special moral force in deliberating about what to do. A superhuman deliberator might proceed differently: he or she might be able to deliberate about what to do without intermediate steps and without the help of categories like “the law’s content” or “the house rules.” But none of us is superhuman: we deliberate in stages, and general moral categories like the content of the law play an important role in our ordinary moral thinking.

Perhaps these comments point to good enough reasons to maintain and vindicate the notion of the law’s content within the law-as-morality framework—provided, of course, that there aren’t downsides to doing so. But Hershovitz thinks there are downsides to consider. He worries—like Dworkin did before him—that notions like the content of the law are prone to cause confusion in jurisprudence.<sup>61</sup> And Hershovitz isn’t only concerned about misunderstandings. He’s also concerned about misallocated attention. He worries—and, given the content of this Response, presciently—that jurisprudence will focus on the classificatory questions at the expense of the moral questions (for example, the question about how and why our community’s legal history affects our rights and obligations and powers) that, in his view, belong at the center of jurisprudence.<sup>62</sup>

Hershovitz might be right about some of these costs, but I think it’s too soon to tell. He and Greenberg have laid out these issues much more clearly than before, and confusion might well be less common and less distracting going forward.<sup>63</sup> At the very least, then, it’s premature to give up Greenberg’s vindicatory version of the law-as-morality framework. Even so, I share Hershovitz’s concerns about the potential misallocation of attention in jurisprudence. The moral questions are more important—certainly as a practical matter, but even as philosophical puzzles that are worth solving—and they deserve the lion’s share of the attention. But I’m not sure that the proper response to this point is to give up Greenberg’s project, provided—and this is a big proviso—it can be done, and that we have reasons to do it.

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61. *E.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 1, at 293, 337.

62. Hershovitz, *supra* note 1, at 1203–04.

63. For example, their work makes it (even) clearer that we should carefully distinguish existing legal materials and practices from existing legal obligations, rights, and so on.

**CONCLUSION**

Let's quickly take stock. This Response has focused on one question: if law is best understood as a part of morality, then what explains the ordinary distinction we draw between law and morality? Greenberg argues that certain criteria sort moral rights and obligations that are legal from those that aren't. Hershovitz, in contrast, thinks it's most important to start by understanding how and why we classify some moral obligations as legal. Once we understand this, he argues, we'll see why Greenberg's attempt misfires. We don't classify moral obligations as legal simply because they satisfy certain criteria that set them apart. Instead we classify moral obligations as legal to accomplish different goals. And because our goals vary, so do the moral obligations we classify as legal. In this Response, I have defended Greenberg's view against Hershovitz's alternative. I don't think Hershovitz has offered sufficient reason to reject the principled boundary-drawing project, and I have offered several reasons to think it can and should be done. But I argued that Greenberg's attempt to draw the boundary fails, and outlined what seems like a more promising approach to the challenge.

In conclusion, it's worth noting how things look if we take a step back. I have granted much of the law-as-morality framework for the sake of discussion, both because I think it's on the right track and because doing so enables me to reach the important and interesting choice between Greenberg's approach and Hershovitz's. But the law-as-morality framework is quite radical in some respects, and other readers will be less inclined to grant Greenberg and Hershovitz all that I have. So the most important debate—at least in the sociological sense, but perhaps philosophically too—is between those who accept the law-as-morality framework, and those who reject it. And in this debate, Greenberg and Hershovitz are allies with a tall task ahead. But their Essays, taken together, are an impressive start.

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Preferred Citation: Steven Schaus, *How To Think About Law as Morality: A Comment on Greenberg and Hershovitz*, 124 YALE L.J. F. 224 (2015), <http://www.yalelawjournal.org/forum/how-to-think-about-law-as-morality>.