Legal Theory, **28** (2022), 59–88.
 0361-6843/22
doi:10.1017/S1352325221000276

IN DEFENSE OF THE STANDARD PICTURE: WHAT THE STANDARD PICTURE EXPLAINS THAT THE MORAL IMPACT THEORY CANNOT

Bill Watson*
Cornell University, Sage School of Philosophy, Ithaca, New York, United States

ABSTRACT
How do legal texts determine legal content? A standard answer to this question—sometimes called "the standard picture"—is that legal texts communicate something and what they communicate is identical to legal content. Mark Greenberg criticizes the standard picture and offers in its place his own "moral impact theory." My goal here is to respond to Greenberg by showing how the standard picture better explains legal practice than the moral impact theory does. To that end, I first clarify certain aspects of the moral impact theory. I then critique the theory, focusing on its inability to explain (i) why practitioners reason about legal content as they do and (ii) why they agree on legal content as often as they do. Finally, I refine the standard picture and demonstrate how it explains what the moral impact theory cannot.

We can distinguish two senses in which we use the word "law." We sometimes use it to refer to legal texts like statutes, regulations, or judicial opinions. But we also sometimes use it to refer to legal norms like obligations, powers, or permissions.[1] Legal theorists call law in this second, normative sense "the content of the law" or "legal content." The question I address here is how law in the first sense (legal texts) determines law in the second sense (legal content). This question has a standard answer, one so commonly presupposed by courts and lawyers as to be usually taken for granted. The standard answer is roughly this: legal texts communicate something, and that communicative content is identical to legal content; what legal

* I am grateful to Emad Atiq, Danielle Limbaugh, Julia Markovits, Andrei Marmor, Anthony Sangiuliano, Bianca Waked, and two anonymous referees for their comments.

1. I use "norms" loosely to refer to any standard of criticism, including any rule or principle. *Cf.* Scott J. Shapiro, Legality (2011), at 41 (employing a similarly broad notion of norms).

texts communicate—or, as lawyers and judges tend to say, what legal texts "mean"—*just is* legal content. Following Mark Greenberg, I call this answer "the standard picture."

The standard picture is the subject of recent criticism from Greenberg and others,[2] and Greenberg offers in its place his own moral impact theory of law.[3] My aim here is to defend the standard picture and demonstrate its explanatory superiority to the moral impact theory. To that end, I devote Section I to clarifying the moral impact theory. The theory assumes that when legal institutions act—when legislatures enact statutes, agencies make regulations, courts render decisions, etc.—those actions can impact moral norms. For instance, enacting a traffic regulation can, by coordinating expectations, create a moral obligation to drive a certain way; or enacting a criminal statute can precisify a moral obligation to refrain from certain conduct. The actions of legal institutions can, in a phrase, have a *moral impact*. The theory claims that this moral impact is identical to legal content—though what that means remains to be seen.

Section II shifts from explication of the moral impact theory to critique of it.[4] The theory is subject to familiar objections to antipositivist theories of law, including that it struggles to account for gravely immoral legal content and implies that an entire legal community can be mistaken about what the content of its law is. As these are familiar worries, I discuss them only briefly and focus instead on two further problems for the theory. First, the theory is

2. For criticism of the standard picture, *see, e.g.*, Dale Smith, *The Practice-Based Objection to the 'Standard Picture' of How Law Works*, 10 JURISPRUDENCE 502, 519–523 (2019); William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1085–1093 (2017); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 509–511 (2013); Mark Greenberg, *The Standard Picture and Its Discontents*, *in* 1 OXFORD STUDIES IN PHILOSOPHY OF LAW 39, 72–102 (Leslie Green & Brian Leiter eds., 2011).

3. For Greenberg's work on, and leading up to, the moral impact theory, *see* Mark Greenberg, *What Makes a Method of Legal Interpretation Correct? Legal Standards vs. Fundamental Determinants*, 130 HARV. L. REV. F. 105 (2017) [hereinafter Greenberg, *What Makes a Method of Legal Interpretation Correct?*]; Mark Greenberg, *The Moral Impact Theory, The Dependence View and Natural Law*, *in* THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE 275 (George Duke & Robert P. George eds., 2017) [hereinafter Greenberg, *The Dependence View and Natural Law*]; Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014) [hereinafter Greenberg, *The Moral Impact Theory*]; Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2013) [hereinafter Greenberg, *Legislation as Communication*]; Greenberg, *supra* note 2; Mark Greenberg, *Hartian Positivism and Normative Facts: How Facts Make Law II*, *in* EXPLORING LAW'S EMPIRE 265 (Scott Hershovitz ed., 2006); Mark Greenberg, *How Facts Make Law*, 10 LEGAL THEORY 157 (2004) [hereinafter Greenberg, *How Facts Make Law*].

4. For other responses to the moral impact theory, *see* Larry Alexander, *In Defense of the Standard Picture: The Basic Challenge*, 34 RATIO JURIS 187 (2021); Barbara Baum Levenbook, *Mark Greenberg on Legal Positivism*, *in* THE CAMBRIDGE COMPANION TO LEGAL POSITIVISM 742 (Torben Spaak & Patricia Mindus eds., 2021); Jeffrey Goldsworthy, *The Real Standard Picture, and How Facts Make It Law: A Response to Mark Greenberg*, 64 AM. J. JURIS. 163 (2019); Alani Golanski, *Argument and the Moral Impact Theory of Law*, 11 WASH. U. JURIS. REV. 293 (2019); Thomas Bustamante, *Law, Moral Facts and Interpretation: A Dworkinian Response to Mark Greenberg's Moral Impact Theory of Law*, 32 CAN. J. L. & JURIS. 5 (2019); Andrei Marmor, *What's Left of General Jurisprudence? On Law's Ontology and Content*, 10 JURISPRUDENCE 151 (2018).

radically out of step with how lawyers and judges actually reason and argue about legal content: we do not observe practitioners reasoning or arguing about a moral impact in most cases. Second, the theory cannot explain why practitioners agree on legal content as often as they do. If the theory were correct, much of what practitioners now agree upon would be open to reasonable dispute, and it would be a mystery why the law coordinates and settles matters as well as it does.

Lastly, Section III refines the standard picture, defends it against several objections, and demonstrates its explanatory superiority to the moral impact theory. Properly understood, the standard picture identifies a legal text's *contribution* to legal content with the *directive* that the text communicates. So defined, the standard picture not only avoids objections posed by Greenberg and others but also better accounts for common features of legal practice than the moral impact theory does. Ultimately, I do not have space here to exhaustively defend the standard picture; much more remains to be said about how the standard picture fits into a broader positivist theory of law, how it can account for the content of common law (if it can), and how it compares to other theories besides Greenberg's. Nevertheless, I hope to show that the standard picture is at least a viable answer to the question of how legal texts determine legal content.

I. CLARIFYING THE MORAL IMPACT THEORY

Greenberg situates his theory within general jurisprudence's great debate: the debate between positivists and antipositivists over the relationship between law and morality. The definitions of positivism and antipositivism, and even the extent to which they disagree, are disputed, but the details of these positions need not detain us here. Legal content is not among the metaphysically basic facts of the universe. It is determined by other, more basic facts. One way to frame the positivist-antipositivist debate is as a disagreement over what kinds of more basic facts determine legal content.[5] Positivism claims that social facts—facts about the actions and attitudes of people or institutions—are the only necessary determinants of legal content, such that moral facts either do not determine legal content at all or do so merely contingently. Antipositivism claims that moral facts are necessary determinants of legal content.

The moral impact theory is an antipositivist theory, but Greenberg approaches the debate from a unique angle. He is less concerned with *what* kinds of facts determine legal content than with *how* certain social facts determine legal content. There are certain social facts that virtually

5. For this framing of the positivism-antipositivism debate, *see* David Plunkett, *Negotiating the Meaning of "Law": The Metalinguistic Dimension of the Dispute over Legal Positivism*, 22 Legal Theory 205, 206–207 (2016); Shapiro, *supra* note 1, at 27; Greenberg, *How Facts Make Law*, *supra* note 3, at 157–158.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

everyone—positivist and antipositivist alike—believes to be among the determinants of legal content. These include social facts like legislatures enacting statutes, agencies promulgating regulations, and courts rendering decisions. Greenberg variously refers to social facts of this sort as "law-determining practices,"[6] "law-creating actions,"[7] or "the actions of legal institutions."[8] The question for Greenberg is *how these social facts*, which are uncontroversially among the determinants of legal content, actually determine legal content.

This is an important question and one that could spur progress in an old debate. Greenberg's answer to it is the moral impact theory. Broadly speaking, the moral impact theory makes two claims: (1) the actions of legal institutions can impact moral norms (e.g., change or precisify what we morally ought to do) and (2) that moral impact is identical to legal content. The first claim is uncontroversial and consistent with the standard picture. I will have nothing to say about it here. My focus is instead on the second claim, which Greenberg states as follows:

> MORAL IMPACT THEORY. "The content of law is that part of the moral profile created by the actions of legal institutions in the legally proper way."[9]

There is a lot to unpack here. In the rest of this section, I first attempt to lay out the moral impact theory charitably and clearly. I then address the theory's scope.

A. Unpacking the Theory

Understanding the moral impact theory requires further explanation of at least: (1) "the actions of legal institutions," (2) how those actions "create" the "moral profile," and (3) "the legally proper way" for them to do so.

The actions of legal institutions. Greenberg never defines "the actions of legal institutions." He at most gives examples like legislatures enacting statutes or courts rendering decisions.[10] Perhaps he intends the phrase to denote *every* social fact that can generate legal content, but if so, the phrase is both under- and overinclusive. It is underinclusive because custom can generate legal content but is not an action of a legal institution. The British doctrine of parliamentary sovereignty, for instance, is part of the content of British law but does not arise from any action of a legal institution (unless we stretch "action" and "institution" beyond recognition to include longstanding acceptance of the doctrine by officials). The extension of the phrase "the actions of legal institutions" is thus too narrow to

6. Greenberg, *How Facts Make Law*, *supra* note 3, at 158.
7. Greenberg, *supra* note 2, at 41.
8. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1288.
9. *Id.* at 1323.
10. *Id.* at 1322–1324.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

encompass *every* social fact that we commonly deem capable of generating legal content.

The phrase is also overinclusive. Legal institutions can take numerous actions. A legislature can draft a bill, debate it, vote on it, and enact it. The police can enforce a statute by ticketing or arresting violators. All of these—drafting, debating, voting, enacting, enforcing—are plausibly actions of legal institutions. But they do not all generate legal content. Mere preparatory actions like drafting, revising, and debating cannot generate legal content. These actions may, once a statute is *enacted*, be evidence of legal content. But they do not by themselves generate legal content.[11] Other actions, like enforcing, also cannot generate legal content. Indeed, police can only enforce a statute if they already know roughly what the legal content generated by the statute requires.

Greenberg often uses statutory-interpretation cases to illustrate his theory, and it is clear that what most interests him is statutes and other legal texts like regulations and judicial opinions. We can clarify his theory—and more importantly for my purposes, sharpen his theory's contrast with the standard picture—by understanding it as an account of how *legal texts* determine legal content.[12] By "legal texts," I mean oral or written speech by an individual or institution (1) having authority to make legal content and (2) speaking with the intention of exercising that authority. A legal text, in other words, is a speech act by an individual or institution having authority to make law and intending to exercise that authority.[13] It is

11. Greenberg sometimes refers to the actions that make up legislative history as possible, though debated, "determinants of legal content." *E.g.*, Greenberg, *What Makes a Method of Legal Interpretation Correct?*, *supra* note 3, at 120. But that is misleading. No one, not even a committed intentionalist, believes that the actions that make up legislative history determine legal content, in the sense of fixing what legal content is. Rather, an intentionalist claims that a legislature's communicative intention fixes a statute's legal content and legislative history is *evidence* of that intention. For instance, an intentionalist would say that Congress's communicative intention in enacting a statute fixes the statute's legal content and a House Committee report is evidence of Congress's communicative intention. No one would say that the House Committee report itself fixes legal content.

12. Greenberg avoids "legal text" and similar terms like "statute" or "regulation" because they are "legal-content laden" (i.e., their extension is partly determined by legal content). Greenberg, *How Facts Make Law*, *supra* note 3, at 167–168. He worries it would be question-begging to use legal-content-laden terms to pick out the factual inputs that his theory maps onto legal content and instead prefers to speak of more basic facts involving "people's sayings and doings." *Id.* at 173. This worry, however, is misplaced and stems from conflating two distinct questions: the question of what counts as a legal text, and the question of how legal texts determine legal content. As discussed below, Greenberg's theory does not even try to answer the first of these questions. Thus, making legal texts the factual inputs for his theory cannot beg the particular question he is trying to answer.

13. On legal texts considered as a kind of speech act, *see* Andrei Marmor, The Language of Law (2014), at 12–22. I take legal texts to be social facts because they are facts about the conduct of persons or institutions. That said, legal texts obtain in virtue of other, more basic facts, and I do not mean to presuppose that these more basic facts must be social facts alone. For purposes of this paper, I purposefully leave open the question of whether legal texts obtain in virtue of just social facts or a combination of social and moral facts. Although I define legal texts in terms of having and exercising lawmaking authority, I leave open what it is to

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

such speech acts that are the relevant "actions of legal institutions." Thus, consider:

> MORAL IMPACT THEORY (REVISED 1). The content of the law is that part of the moral profile created by legal texts in the legally proper way.[14]

Creating the moral profile. Greenberg coins the term "moral profile" to refer to any moral norm—any moral obligation, power, permission, etc.[15] He gives several examples of how legal texts can "create" the moral profile.[16] Legal texts can establish a criminal justice system and thereby morally empower the state to use retributive force and morally disable private persons from using such force. Legal texts can precisify preexisting moral norms: a statutory-rape law, for instance, precisifies a preexisting moral obligation not to sexually abuse children by specifying the age of consent. Legal texts can also solve coordination problems and thereby morally obligate us to abide by that solution: a traffic regulation telling us which side of the road to drive on morally obligates us to drive on that side. And democratically enacted legal texts can morally obligate us to comply with what was democratically agreed upon.

Closer examination of these examples, however, reveals that Greenberg's use of the word "create" is misleading. Legal texts need not create moral norms out of whole cloth to generate legal content on his view. What his examples share in common is not so much legal texts creating moral norms as legal texts providing *moral reasons* to follow certain norms rather than others.[17] Thus, legal texts establishing a criminal justice system provide moral reasons for the state to have the power to retributively punish offenders and for private persons to have no such power. Legal texts precisifying a preexisting moral norm provide moral reasons to follow the precisified norm. Legal texts solving coordination problems provide moral reasons to follow norms supporting those texts' solutions. And legal texts resulting from fair democratic processes provide moral reasons to follow what was democratically agreed upon.

In short, it seems that the way legal texts have a moral impact on Greenberg's view is by affecting our moral reasoning. When Greenberg says that a legal text creates part of the moral profile and thereby generates legal content, we should understand him as saying the text provides a moral

have and exercise lawmaking authority: perhaps it is just a matter of social practice or perhaps it also requires moral justification.

14. So understood, the moral impact theory explains the content of written but not customary law. Perhaps Greenberg would object to this, though I am not sure. Regardless, if Greenberg's theory fails as an account of the content of written law, that alone will be sufficient reason to reject it.

15. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1308–1309.

16. *Id.* at 1310–1316.

17. By "follow a norm," I mean accepting a norm as a standard of criticism. To say there is a moral reason to follow a norm is to say there is a moral reason to accept it as such a standard.

reason to follow a norm and that norm *just is* legal content. If the text provides a moral reason to follow an obligation, the obligation is a legal obligation; if it provides a moral reason for an institution to have a power, the power is a legal power; if it provides a moral reason for someone to have a permission, the permission is a legal permission; and so forth. This suggests:

> Moral Impact Theory (Revised 2). If a legal text provides a moral reason to follow a norm in the legally proper way, that norm *just is* legal content.

The second revised formulation raises an important issue: When a legal text provides a moral reason to follow a norm, does it matter whether the reason is pro tanto or all things considered? Greenberg "tentatively" suggests that "the relevant moral obligations" must be "all-things-considered, rather than pro tanto."[18] I take this to mean that a legal text must provide an *all-things-considered* moral reason to follow a norm if it is to generate any legal content at all. But that tentative position is highly implausible. Suppose a city council enacts an ordinance stating "No vehicle shall park on a city street after a snowfall." What is the ordinance's moral impact? Greenberg could say that the ordinance provides an *all-things-considered* moral reason not to park on a city street after a snowfall, but that would be absurd. In an emergency, there could be defeating reasons to park on a city street anyway.[19]

Does that mean the ordinance fails to generate legal content? If so, most legal texts will fail to generate legal content because few, if any, provide all-things-considered moral reasons. That cannot be what Greenberg intends. He could instead say that the ordinance provides an all-things-considered moral reason to follow a loose obligation not to park on a city street after a snowfall, *except* in an unspecified range of cases where there is sufficient reason to park there anyway. But, then, we must know what someone should, all things considered, do in any situation before we can know what the ordinance prescribes in that situation. Determining what someone should, all things considered, do becomes prior to determining what the content of the law is. Surely, it is the other way around: we must know the content of the law before determining

18. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1307 n.41.

19. Indeed, if we understand the moral impact theory as requiring that the ordinance provide an all-things-considered reason to follow a norm in order to generate legal content, then perhaps legal content would have to be relativized to each person's epistemic situation. Suppose that it would be very convenient for both Sally and Jane to park overnight on a certain street after a snowfall. Suppose further that Sally knows that this street will not be plowed within the next twenty-four hours, such that her car will pose no obstacle to clearing the city's streets of snow, while Jane does not have this knowledge. Arguably, Sally (based on what she knows) does not have all-things-considered reason to comply with what the statute directs, while Jane (based on what she knows) does. Must we conclude that the ordinance does not prohibit Sally from parking on that street but does prohibit Jane? Maybe, but that would be a highly unintuitive result. I am grateful to an anonymous reviewer for suggesting this point.

what we ought to do on the balance of reasons in situations where the law applies.

In sum, Greenberg's tentative position that a moral reason must be all things considered to generate legal content implies either that most legal texts do not generate legal content or that determining what we should, all things considered, do is prior to determining what the content of the law is. Neither result is tenable. As a friendly amendment to the theory, I propose that only a pro tanto moral reason is necessary to generate legal content:

> MORAL IMPACT THEORY (REVISED 3). If a legal text provides a pro tanto moral reason to follow a norm in the legally proper way, that norm *just is* legal content.

The legally proper way. Greenberg says little about "the legally proper way," but he apparently includes this restriction for just one purpose. Under certain circumstances, a legal text will provide a moral reason obligating us to undermine that text. Suppose a statute orders citizens to engage in a form of wrongful discrimination. The statute provides a moral reason for citizens to call for the statute's repeal or otherwise frustrate its purpose. But the statute's contribution to legal content cannot be an obligation to do those things; the statute's contribution to legal content cannot be an obligation to undermine the statute. Greenberg posits that, insofar as legal texts provide this sort of moral reason, they do not operate in "the legally proper way."[20] We can express the same idea more clearly by referring to *non-undermining reasons*, that is, reasons not manifestly at cross-purposes with the legal text:

> MORAL IMPACT THEORY (REVISED 4). If a legal text provides a non-undermining, pro tanto moral reason to follow a norm, that norm *just is* legal content.

The fourth revised formulation is, I think, as clear a statement of the moral impact theory as we can expect and one that is mostly faithful to what Greenberg intends. One might worry that I have merely substituted my own jargon for Greenberg's, but I believe we have made progress. In particular, we have clarified that: (1) the moral impact theory is best understood as addressing how *legal texts* determine legal content; (2) the way that legal texts determine legal content is by providing *moral reasons* to follow norms; (3) on the most defensible version of the theory, those moral reasons need only be *pro tanto*; and (4) those moral reasons cannot *undermine*—cannot be manifestly at cross-purposes with—the legal text.

B. The Scope of the Theory

I said above that the moral impact theory is an account of how certain social facts determine legal content, but it is worth stating more precisely what the

20. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1322.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

theory does and does not purport to explain. Greenberg is less than clear in this regard, at times presenting his theory as a "theory of law," and at times as an "account of what statutory interpretation involves."[21] Below, I first describe four distinct jurisprudential questions, which I call the questions of legal validity, legal content, legal interpretation, and moral legitimacy. I then show that the moral impact theory only directly answers the second of them: the question of legal content.

Consider again the ordinance stating "No vehicle shall park on a city street after a snowfall." Of the many questions we might ask about this ordinance, here are four. First: What makes the ordinance a legal text? Call this *the question of legal validity*. Second: How does the ordinance determine legal content? For instance, does its communicative content determine legal content or does something else? Call this *the question of legal content*. Third: What is *this* ordinance's legal content? For instance, is it an obligation never to park on a city street after a snowfall or is it more limited? Call this *the question of legal interpretation*. Fourth: When is the ordinance's legal content morally binding? Call this *the question of moral legitimacy*.

Let us consider each of these questions a bit more closely, starting with the question of legal validity: What makes something a legal text? Or more broadly: What makes any fact a source of legal content? I will not attempt to answer the question of legal validity here. I raise it only to distinguish it from a second question. While it is one thing to ask *what* makes any fact a source of legal content, it is another to ask *how* any source determines legal content. The question of legal content asks: How does any legal text or other source of legal content determine legal content? The standard picture is a partial answer to this second question; it posits that what a legal text communicates *just is* legal content. (I say that the standard picture is only a *partial* answer because it does not address how custom determines legal content.)

Next, the question of legal interpretation asks: What is *this* particular legal text's legal content?[22] This is a different kind of question because it concerns not law in general but rather *the* law of a specific jurisdiction. Whereas the questions of legal validity and legal content are abstract inquiries into what determines any legal norm and how, each application of the question of legal interpretation is a concrete inquiry into what a given source contributes to legal content. Finally, the last question I want to raise is that of moral legitimacy: When is legal content morally binding? That is, when is legal content something we morally ought to comply with?

To sum up:

21. *Id.* at 1291–1293.

22. I am using "interpretation," as courts and lawyers normally do, to refer to the process of reasoning from any legal text to its legal content. All legal texts require interpretation in this minimal sense, even those whose legal content is clear on their face. None of this should be taken to endorse an interpretivist position like Dworkin's.

- Legal validity: What makes something a legal text or other source of legal content?
- Legal content: How does any source determine legal content?
- Legal interpretation: What is a particular source's contribution to legal content?
- Moral legitimacy: When, if ever, is legal content morally binding?

These are not the only questions we can ask about law; taxonomizing questions about law is a difficult business, and there is likely no one right way to cut the pie. I have emphasized these questions merely to help us better understand the scope of Greenberg's theory. So let us now consider which question or questions Greenberg's theory purports to answer.

We interpreted Greenberg's theory as holding that, when a legal text provides a non-undermining, pro tanto moral reason to follow a norm, that norm *just is* a legal norm. In our example, suppose the city's parking ordinance provides a non-undermining, pro tanto moral reason to follow an obligation not to park a vehicle on a city street after a snowfall. (Put to the side for now how we know this or what the precise contours of the obligation are.) On the moral impact theory, that obligation *just is* a legal obligation. From this much, we can see that Greenberg's theory directly answers the question of legal content: it tells us how the ordinance, as a legal text, determines legal content. The standard picture is a competing answer to the question of legal content, so it is not surprising that Greenberg uses it as a foil to his theory.

The moral impact theory does *not*, however, answer the question of legal validity: it does not tell us what makes something a legal text or other source of legal content.[23] In our example, the theory does not tell us why the city council, as opposed to other institutions, can make law. Nor does it explain when the city council acts to make law. The theory takes certain social facts as given and explains how those facts relate to legal content, but it does not explain why those facts are relevant in the first place.[24] It is an account of *how* certain social facts determine legal content, not an account of *which* social facts determine legal content. None of this is to criticize the theory (one theory need not explain all things); it is just to acknowledge the theory's limits. The moral impact theory is at most a partial theory of law; to be a complete theory of law it would have to be supplemented by an account of what makes any fact a source of legal content.[25]

23. *Cf.* Marmor, *supra* note 4, at 169.

24. Might Greenberg posit that any social fact that has a moral impact is a source of legal content? That still would not answer the question of legal validity, for there are many social facts that have a moral impact but do not generate legal content, e.g., facts about informal promises among friends or parents' relationship to their children.

25. An anonymous reviewer suggested that the moral impact theory may face a circularity problem. The worry is this: on the one hand, it is clear that legal content creates some legal institutions by defining their membership and conferring power on them to make law; but on the other hand, the moral impact theory posits that legal content *just is* the moral impact

Finally, although the moral impact theory does not directly answer the questions of legal interpretation or moral legitimacy, it does have broad implications for them. Merely positing that legal texts' moral impact is identical to their legal content does not tell us what any particular text's legal content is or when that content is morally binding. Still, if the theory is right, then every application of the question of legal interpretation essentially asks: What is *this* text's moral impact? The theory thus implies that legal interpretation is fundamentally an exercise in moral reasoning—and specifically, an exercise in discovering legal texts' moral consequences.[26] This is an important implication and one that I discuss further in Section II below. With respect to moral legitimacy, the version of the theory developed above (on which pro tanto moral reasons can create legal content) implies that there is *always* a pro tanto moral reason to comply with legal content. I discuss this implication further in Section II as well.

II. CRITIQUING THE MORAL IMPACT THEORY

My goal so far has been to charitably lay out Greenberg's theory. I proposed that the moral impact theory is an answer to the question of legal content, which holds that legal texts determine legal content by providing pro tanto, non-undermining moral reasons to follow certain norms. In this section, I will critique the theory, presenting four separate objections to it. The first two objections are familiar worries for most antipositivist theories of law; the third and fourth objections are more tailored to Greenberg's specific brand of antipositivism.

A. Two Familiar Objections

The objection from gravely immoral legal content. A frequent objection to antipositivist theories of law is that they cannot account for gravely immoral legal content; they struggle to explain, for instance, how the Fugitive Slave Act—which directed state officials to cooperate in the return of escaped slaves[27]—generated legal content. As Greenberg presents his theory, legal texts must provide *all-things-considered* moral reasons to follow

of the actions of legal institutions. How, then, are we to explain the legal content that creates legal institutions in the first place? Myself, I do not think that this presents a problem for Greenberg's theory so much as it shows the theory's limitations.

Greenberg's theory can explain without circularity how certain social facts, taken as given, determine legal content that creates legal institutions. Greenberg can posit, for instance, that the legal content creating Congress and conferring power on Congress to make law *just is* the moral impact of the American people ratifying the US Constitution in 1788. What his theory cannot explain is why *those* social facts are relevant in the first place; it cannot explain why the American people ratifying the Constitution in 1788 is a fact that gives rise to legal content. To explain this, Greenberg would have to supplement his theory with an account that serves a similar explanatory role to that which the rule of recognition serves in most positivist theories of law.

26. *See* Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1303.

27. Fugitive Slave Act, 9 Stat. 462 (1850) (repealed 1864).

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

norms for those texts to generate legal content. Legal texts like the Fugitive Slave Act obviously provide no such reasons. Thus, the Fugitive Slave Act did not generate any legal content on Greenberg's view. He concedes as much, concluding that there are no "truly evil legal norms."[28]

Yet it seems that the Fugitive Slave Act *did* create legal content—gravely immoral legal content, but legal content nonetheless. The judges and lawyers who lived under it certainly did not regard it as a legal nullity. Although Greenberg does not share the intuition that texts like the Fugitive Slave Act create legal content,[29] he still owes us an explanation of why that intuition is so widely held. That is, he owes us an account of the widely held belief that not just gravely immoral legal texts but also gravely immoral legal norms can and do exist.[30] While Greenberg notes that "[t]rue theories often have counterintuitive consequences,"[31] that does not absolve him of the need to explain why so many people have the intuitions that they do.

But what about the more plausible version of Greenberg's theory advanced above, on which legal texts need only provide *pro tanto* moral reasons? The objection from gravely immoral legal content presents less of a problem for this version of the theory.[32] One can argue that a text like the Fugitive Slave Act does not provide even a pro tanto moral reason to follow a norm. But it is difficult to distinguish between an extremely weak pro tanto moral reason that is easily defeated and the absence of any pro tanto moral reason whatsoever. I doubt that we have clear intuitions about this. Accordingly, while the objection from gravely immoral content is a strong objection to Greenberg's theory as he originally presents it, it is less forceful against the most plausible version of the theory requiring only pro tanto moral reasons.

The objection from the possibility of widespread legal error. Andrei Marmor offers the following thought experiment as an objection to Ronald Dworkin's theory of law as integrity.[33] Suppose the US Supreme Court tries to resolve a question of legal interpretation in the manner prescribed by law as integrity. A majority of the justices might morally err: they might decide that the answer to the question is M, when the best constructive interpretation of the relevant legal and political decisions is not-M. After the Court's decision, practitioners would uniformly agree that the content of the law is

28. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1337–1338.

29. *See id.* at 1337.

30. As Emad Atiq explains, "If anti-positivists can do no better than deny the legality of morally abhorrent rules without plausibly explaining why widely shared intuitions are mistaken, anti-positivism is deservedly characterized as the more counterintuitive position." Emad H. Atiq, *There Are No Easy Counterexamples to Legal Anti-Positivism*, 17 J. ETHICS & SOC. PHIL. 1, 3 (2020).

31. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1338.

32. None of this is meant to suggest that legal content must be morally optimific on any version of the moral impact theory. Greenberg allows that legal content may be "morally flawed." *Id.* at 1304. The point is that his theory does not allow for *gravely* immoral legal content.

33. ANDREI MARMOR, PHILOSOPHY OF LAW (2011), at 90–92.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

determinately M. Nevertheless, law as integrity might still hold that the content of the law is determinately not-M. Although this may not be troubling as an isolated occurrence, we can imagine it reoccurring over and over again. Dworkin's theory thus suggests that it is possible for practitioners to be mistaken about much of the content of their law.

Mutatis mutandis, we can apply the same thought experiment to the moral impact theory. In resolving a contested question of legal interpretation, a majority of the Court might morally err and conclude that a legal text's moral impact is something other than it really is. Practitioners would then uniformly agree that the content of the law is determinately one thing, while the moral impact theory might still say it is determinately something else.[34] This could happen over and over again. Thus, the moral impact theory also suggests that it is possible for a legal community to be mistaken about much of the content of its law—which is a hard pill to swallow. As Marmor writes, "Surely, at some point one would have to doubt whether a theory that renders a great part of the law to be a legal error is really a theory that tells us what the law is."[35]

This has been, no doubt, too quick a discussion of these two familiar objections, but they are not my main focus here. The objection from gravely immoral legal content does not clearly threaten the most plausible version of the moral impact theory; moreover, we know that Greenberg is aware of the objection and finds it unconvincing. The objection from the possibility of widespread legal error is, I think, an effective objection against any version of the moral impact theory, and Greenberg has not, to my knowledge, addressed it. Yet because the objection is already a familiar one, I do not want to belabor it. Instead, I want to turn next to two objections that are more tailored to Greenberg's specific brand of antipositivism. These objections are significant not only because they show what Greenberg's theory fails to explain about legal practice but also because they highlight what the standard picture explains quite well.

B. Two Especially Pressing Objections for the Moral Impact Theory

For the rest of the paper, I will assume that a metaphysical account of what determines legal content—which is what Greenberg's theory purports to be[36]—should be largely consistent with practitioners' attitudes and behavior

34. To be clear, the objection is not that the moral impact theory says that the content of the law was determinately not-M *before* the Court's decision. Rather, the objection is that the moral impact theory might continue to say that the content of the law is determinately not-M even *after* the Court's decision that it is M. I am thus assuming that there is a possibility that the moral impact of the Court's decision would not itself make the content of the law determinately M on a going-forward basis.

35. Marmor, *supra* note 33, at 92.

36. Greenberg writes that the moral impact theory is a "constitutive explanation of the content of the law—i.e., an explanation of which aspects of which more basic facts are the determinants of legal content, and of how those determinants together make it the case that the

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

toward legal content. In particular, such a metaphysical account should be largely consistent with (1) how practitioners reason and argue about legal content and (2) how often they agree on legal content. If an account implies that practitioners' attitudes or behavior toward legal content are widely mistaken or confused, that is at least prima facie reason to reject the account. The burden is then on the account's proponent to explain why practitioners are mistaken or confused in that way.

The objection from legal reasoning. Greenberg acknowledges that there is a standard picture of how legal texts determine legal content and that the moral impact theory is not it.[37] On the standard picture, to discover legal texts' legal content, we must look to what those texts communicate. Not surprisingly, this is what we observe practitioners doing when they reason and argue about legal content. Practitioners often reason and argue about what the words in legal texts mean, what the lawmaker who promulgated those texts intended, or what the purpose of promulgating those texts was—all of which plausibly relates to what those texts communicate. By contrast, we hardly ever observe practitioners arguing about legal texts' moral impact.[38]

To make the objection more precise, we can distinguish easy from hard cases. This distinction sometimes tracks whether existing sources of legal content determinately resolve a legal dispute, but that is not how I will use it here. Rather, let us say that *easy cases* are ones in which virtually any fair-minded practitioner with full knowledge of the relevant sources of legal content would agree on what the governing legal content is.[39] All other cases are *hard cases*. Easy cases do arise; indeed, I argue below that most legal questions that come up in practice are easy cases. What we observe in easy cases is this: practitioners look to the relevant legal texts' communicative content, and because what those texts communicate is sufficiently clear to resolve the case at hand, practitioners agree on what the governing legal content is. We do not observe practitioners arguing or reasoning about legal texts' moral impact.

To be fair, practitioners sometimes mention, and are perhaps even motivated by, legal texts' moral impact. A plaintiff's lawyer will sometimes frame her case to suggest that a legal text provided a moral reason for the defendant to be obligated to do such and such. But a competent lawyer would never rest her whole case on that framing alone. If a lawyer mentions a legal text's moral impact in an easy case, it is because she hopes it will motivate the court to look favorably on her other arguments pertaining to what

various legal obligations, powers, and so on are what they are." Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1295–1296.

37. *See* Greenberg, *supra* note 2, at 60–72.

38. *Cf.* Golanski, *supra* note 4, at 310.

39. I have in mind here something like the standard for qualified immunity or collateral review under the Antiterrorism and Effective Death Penalty Act. *See, e.g.*, Woods v. Etherton, 136 S. Ct. 1149, 1151 (2016).

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

the text communicates; it is not because she takes the text's moral impact to be dispositive of what the governing legal content is. Similarly, if a judge considers a legal text's moral impact in an easy case, it is likely because she wishes to show that she is aware of the moral stakes of her decision and, ideally, that her decision is morally right. It is not because she sees the moral impact as legal grounds for her decision.

Hard cases are different because, there, courts do commonly engage in moral reasoning. The usual positivist explanation of moral reasoning in hard cases is that courts are *making* new legal content. But the present objection to the moral impact theory does not even require that assumption because the moral reasoning courts use in hard cases is almost never *moral-impact-style* reasoning. The moral arguments that practitioners and courts make in hard cases usually concern the downstream consequences of deciding a case a certain way. They argue, for instance, that deciding a case a certain way would give the wrong incentives to future litigants, would increase administrative costs, would undermine the rule of law, etc. These are arguments about what the morally best resolution of a case is; they are not arguments about what the moral impact of legal texts is. Evidence of moral-impact-style reasoning in judicial opinions is rare.

In sum, we do not observe practitioners treating legal texts' moral impact as grounds for deciding either easy or hard cases. This poses an especially pressing problem for the moral impact theory because the theory does not simply make morality a necessary condition for legality, as some natural law theories do. Rather, the theory purports to explain *how* certain social facts determine legal content. It thus goes to the heart of legal reasoning. If the theory is right, then practitioners are not merely mistaken about the legality of a few immoral norms, *they are mistaken in how they practice law*. They should be arguing about what the moral consequences of legal texts are, but that is not what we see them doing. This is at least prima facie reason to reject the moral impact theory; it puts the burden on Greenberg to explain why practitioners are pervasively mistaken in how they reason and argue about legal content.

Greenberg raises a couple of responses to this style of objection. One is that we should distrust how practitioners theorize about their practice: "[P]ractitioners are notoriously bad at theorizing their own practice. So we should give little weight to what practitioners say when they put on their philosophy hats."[40] Even if that is true, it misconstrues the objection. The issue is not how practitioners theorize about law but how they practice law; the objection is not that the moral impact theory fails to accord with practitioners' jurisprudential theories but that it fails to accord with how they behave in practice. If Greenberg's theory were right, we would expect practitioners to reason and argue about legal texts' moral impact, but we observe no such thing.

40. Greenberg, *supra* note 2, at 72.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

A second response points to substantive canons of statutory interpretation—like the rule of lenity—as evidence of courts deciding cases based on legal texts' moral impact.[41] In Section III.B, I show how the standard picture better explains courts' use of substantive canons. For now, it suffices to say that substantive canons are *not* evidence of courts looking to legal texts' moral impact. First, courts apply substantive canons in only a fraction of cases; they more often decide cases without resort to any such canon. Second, the application of substantive canons is sharply limited by legal texts, which state how and when a given canon applies.[42] Courts applying substantive canons are not engaged in an unbounded inquiry into legal texts' moral impact; they are rather applying those canons in the manner communicated by other legal texts (a point that I hope will become clearer when I return to it in Section III below).

The objection from pervasive agreement. It is commonly believed that a theory of law must be able to explain how practitioners can disagree over legal content.[43] But it is equally, if not more, important that a theory of law be able to explain why practitioners *agree* on legal content as often as they do.[44] In practice, we observe pervasive agreement over most legal content. Consider how the vast majority of legal disputes are resolved: most never make it to court; of those that do, most settle;[45] of those that proceed past discovery, many end in judgment as a matter of law; and of the few that are appealed, most are affirmed by unanimous panels. Think also of all the issues that parties to litigation rarely dispute (e.g., parties often take personal jurisdiction and venue for granted). Some issues are virtually never disputed (e.g., that a judge was properly appointed). Such pervasive agreement calls out for an explanation.

The problem is that the moral impact theory cannot explain pervasive agreement over legal content. A legal text's moral impact at least arguably depends on a variety of factors, such as the fairness of the process by which the text was enacted, whether the text achieves an on-balance socially beneficial result, and how beneficial or oppressive that result is for particular parties. I take no stance on what factors actually determine a moral impact; I merely note that there is considerable room for disagreement as to both what those factors are and how they should be aggregated and weighed against one another. It is highly unlikely that, if the moral impact theory

41. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1329.

42. *See, e.g.*, Robers v. United States, 572 U.S. 639, 646 (2014) (the rule of lenity "applies only if, after using the usual tools of statutory construction, [the court is] left with a grievous ambiguity or uncertainty in the statute").

43. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986), at 6–7.

44. *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1227 (2009).

45. The high incidence of settlement is partly a function of the cost of litigation, but agreement also plays a role. It is agreement over legal content that allows parties to accurately gauge the expected value of litigating and to decide what an appropriate settlement would be. Uncertainty regarding legal content increases the variability between each side's calculation of expected value and so makes settlement less likely.

were right, we would observe anywhere near as much agreement over legal content as we do. Parties to a legal dispute have every incentive to disagree over legal content, and the moral impact theory suggests that there is much for them to reasonably disagree about.

To make the point more concrete, consider a garden-variety contract dispute with a statute-of-limitations issue. Suppose the Widget Corporation contracts to sell one hundred widgets to a buyer. The contract requires delivery by January 1, 2010, but the Widget Corporation fails to deliver by that date. The relevant statute of limitations is six years, but the buyer does not sue for breach until February 1, 2016. No extraordinary circumstance prevented him from suing earlier; he simply slept on his rights, as people sometimes do. This is an easy case: the trial judge will certainly grant summary judgment for the Widget Corporation (if the case even proceeds that far). What is more, easy disputes like this are common. If there is anything unusual about this particular dispute it is only that it made it into court—the buyer's lawyer should have told him to drop his claim and move on with his life.

The moral impact theory has trouble explaining why this is an easy case. The theory claims that the statute of limitations' legal content is what its moral impact is. But what is the statute's moral impact? The Widget Corporation could argue that the democratic enactment of language referring to a bright-line rule, together with such a rule's ability to efficiently settle disputes, provides a moral reason to preclude people like the buyer from suing for breach more than six years after their claim accrues. The buyer could respond, however, that the statute provides a moral reason to follow a more discretionary norm—one that allows a court to take into consideration, say, the relative financial position of the parties and the ease with which the Widget Corporation can pay the buyer's damages. Which party has the better argument is at least not obvious. Even if the buyer's argument is weak, it is at least a colorable argument about what the statute's moral impact, and hence contribution to legal content, is. A court adhering to Greenberg's theory could not simply dismiss the buyer's argument out of hand.[46]

I purposefully chose a statute-of-limitations example because it illustrates how legal clarity is crucial to law achieving its coordination and settlement functions. Not only does the moral impact theory fail to explain pervasive agreement over most legal content, it fails to account for how law can coordinate action and settle disputes.[47] For law to successfully perform these

46. One way to evade the statute of limitations is to claim equitable tolling—roughly, that extraordinary circumstances prevented you from timely filing and you were not otherwise dilatory. *See, e.g.*, In re Milby, 875 F.3d 1229, 1232 (9th Cir. 2017). Is this an instance of courts looking to moral impact? No, equitable tolling is only an exception to the statute of limitations because judicial opinions have made it so; the doctrine arises from and is bounded by legal texts. *Cf. infra* Section III.B (discussing substantive canons).

47. To be clear, the objection is not that widespread belief in the moral impact theory would inhibit the law from doing something we currently think it *ought* to do—namely, coordinate action and settle disputes. Greenberg anticipates and responds to an objection along those

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

functions, there must be relative clarity as to what legal content is; people must be able to know what the law requires of them. But, as we just saw, the moral impact theory precludes precisely that sort of clarity: every bright-line rule we now agree upon could at least arguably be a vague standard on Greenberg's theory. This is once again prima facie reason to reject the theory; it puts the burden on Greenberg to explain why we so often agree on legal content when it follows from his theory that legal content is usually open to reasonable dispute.

Greenberg's strategy, particularly in recent work, is to minimize any difference between his theory and the standard picture. The moral impact theory, he says, is the "fundamental" account of how legal texts determine legal content, while the standard picture is the "surface" account.[48] Practitioners can get away with behaving as if the standard picture is correct because the standard picture generally reaches the same result as the moral impact theory.[49] I will reply to this point at the end of the paper, but we first need to get a better grasp of the standard picture.

III. DEFENDING THE STANDARD PICTURE

The standard picture, as its name suggests, is meant to represent how practitioners standardly believe legal texts determine legal content. In this section, I first give a preliminary statement of the standard picture. I then defend the standard picture against several objections, refining it along the way. Finally, I conclude by showing how the standard picture explains features of legal practice that the moral impact theory cannot.

A. Toward the Standard Picture

When practitioners interpret a legal text, they generally claim to be searching for the text's "meaning." For instance, in Smith v. United States—a case Greenberg discusses at length[50]—the issue was whether a statutory sentencing enhancement for anyone who "uses . . . a firearm" in a drug-trafficking crime applied to a defendant who traded a firearm for cocaine.[51] The majority held that "uses" meant using a firearm *in any way*, such that the sentencing enhancement applied.[52] The dissent argued that "uses" meant using a firearm *as a weapon*, such that the sentencing enhancement did not apply.[53] But the important point for our purposes is that both the majority and the dissent claimed to be searching for the statute's

lines. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1339. Rather, the objection is that there is *in fact* pervasive agreement over most legal content and the law does *in fact* coordinate action and settle disputes. The moral impact theory cannot explain these facts.

48. Greenberg, *The Dependence View and Natural Law*, *supra* note 3, at 280–281.
49. *Id.* at 310.
50. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1325–1331.
51. 508 U.S. 223, 227–228 (1993).
52. *Id.* at 225.
53. *Id.* at 246 (Scalia, J., dissenting).

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

"meaning."[54] Both the majority and the dissent took for granted that the statute's meaning was identical to legal content.

Of course, "meaning" is a notoriously ambiguous word.[55] It might refer, inter alia, to a legal text's communicative content or to its legal content. For present purposes, however, this ambiguity is revealing. Lawyers and judges are good at drawing minute distinctions; if there were a significant difference in their minds between a legal text's communicative content and its legal content, they would have developed a vocabulary to mark the distinction. But they have not done so.[56] While legal theorists often use "the content of the law" or "legal content" to mark the distinction, those terms have not found their way into everyday practice—presumably because practitioners see no need for them. This is at least some evidence for:

> Standard Picture. A legal text's communicative content *just is* its legal content.[57]

What is communicative content? We can distinguish it, as Greenberg and others do, from semantic content.[58] Semantic content is the information a

54. *Compare Smith*, 508 U.S. at 225 ("We decide today whether the exchange of a gun for narcotics constitutes 'use' of a firearm . . . within the meaning of 18 U.S.C. § 924(c)(1)."), *with id.* at 244 (Scalia, J., dissenting) (claiming to give the "ordinary meaning of 'uses a firearm'").

55. *See* Richard H. Fallon, Jr., *The Meaning of Legal Meaning and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235, 1244–1245 (2015).

56. An anonymous reviewer suggested that practitioners use the terms "interpretation" and "construction" to distinguish between legal texts' communicative and legal contents. *Cf.* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 Const. Comment. 95, 95 (2010). I doubt, however, that this is right. First, while the distinction between "interpretation" and "construction" has figured prominently in recent academic literature on constitutional interpretation, it only rarely appears in practice. Although courts sometimes distinguish between these two terms, *see, e.g.*, Markman v. Westview Instruments, Inc., 52 F.3d 967, 1000–1002 (Fed. Cir. 1995), my sense is that most courts and lawyers regard them as interchangeable, *see, e.g.*, Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012), at 13–14 ("When construing a statute, one engages in *statutory construction*, which has long been used interchangeably with the phrase *statutory interpretation*."); Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 Geo. Wash. L. Rev. 1, 1 n.1 (1993) ("The terms construction and interpretation have been used as synonyms when applied to statutes for as long as scholars have written on the subject.").

Second, even if the distinction between "interpretation" and "construction" were significant in legal practice, the distinction does not seem to track the distinction between legal texts' communicative and legal contents. Legal theorists who employ the interpretation-construction distinction generally say that interpretation aims to discern a legal text's communicative content, while construction aims to discern its "legal effect." *See* John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 Notre Dame L. Rev. 919, 927–928 (2021); Solum, *supra*, at 95. What they mean by "legal effect" is not entirely clear, and perhaps different theorists mean different things by that term. But it seems that "legal effect" most often refers not to legal content itself but to a court's application of a legal text's communicative (and legal) content to the facts of a particular case. I do not think that this undermines the point made above that practitioners do not perceive a significant distinction between legal texts' communicative and legal contents.

57. As formulated by Greenberg, the standard picture comprises three theses. Greenberg, *supra* note 2, at 44–50. I focus just on "the linguistic content thesis," which I take to be the core of the standard picture.

58. *See id.* at 48; Solum, *supra* note 2, at 486–489, 507–508.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

text conveys just by virtue of its words and syntax (what lawyers might call "literal meaning"). Semantic content rarely exhausts all that a text conveys. In ordinary conversation, if someone says "I have two daughters," he conveys that he has two *and only two* daughters; or if a doctor says "You're not going to die," he conveys that you will not die *from this illness*, not that you will never die.[59] Communicative content accounts for both text and context; it is a function of both semantic content and pragmatically communicated content. Let us say for now that communicative content is *all* the information that a text conveys in the context in which it is uttered, regardless of whether that information is asserted or implicated. We will soon see that this conception of communicative content is a little too crude to describe the standard picture, but it is someplace to start.

I should say a bit more about what the standard picture is and is not. The standard picture is an answer to the question of legal content: it is an account of how legal texts determine legal content. The standard picture is *not* a prescriptive theory of legal interpretation: it is not an account of how judges should interpret and apply legal texts to decide cases. The standard picture does *not* tell us how judges should understand communicative content; when judges should hold that communicative content, and hence legal content, is indeterminate; or how judges should resolve such indeterminacies when they occur. The theories that purport to resolve, or at least guide our consideration of, these kinds of questions are prescriptive theories of legal interpretation, like textualism, intentionalism, purposivism, pragmatism, etc.[60]

It is crucial to see that the standard picture is neutral between mainline prescriptive theories of legal interpretation. Let us define textualism as the view that courts interpreting legal texts should strive to give effect to "objectified intent" (to what a reasonable reader would understand those texts to communicate),[61] and let us define intentionalism as the view that courts should strive to give effect to what the texts' authors really meant to communicate (along the lines of Gricean speaker meaning[62]). So defined, textualism and intentionalism are both plausible ways of determining what a legal text communicates and thus what its legal content is on the standard picture. The standard picture gives no reason to prefer one theory over the other. If textualist and intentionalist interpretations of a text diverge, the standard picture concludes that the text's communicative content, and hence contribution to legal content, is indeterminate.

59. *See* MARMOR, *supra* note 13, at 25.

60. I assume that the debate between these theories is a prescriptive debate over how judges should interpret and apply legal texts to decide cases. *Cf.* Mitchell N. Berman, *Our Principled Constitution*, 166 U. PENN. L. REV. 1325, 1332 (2018).

61. For more detailed discussion of textualism, *see* Bill Watson, *Literalism in Statutory Interpretation: What Is It and What Is Wrong with It?*, 2021 U. ILL. L. REV. ONLINE 218, 224–225 (2021); Bill Watson, *Textualism, Dynamism, and the Meaning of "Sex"*, 2022 CARDOZO L. REV. DE NOVO (forthcoming 2022).

62. *Cf.* PAUL GRICE, STUDIES IN THE WAY OF WORDS (1991), at chs. 5–6.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

Much the same can be said of purposivism and pragmatism. We can define purposivism as the view that courts interpreting legal texts should aim to effectuate those texts' purpose, and pragmatism as the view that courts interpreting legal texts should aim to maximize social welfare. On one understanding, purposivism and pragmatism are just directions to judges on how best to understand legislatures' speaker meaning. It is plausible, not to mention charitable, to attribute to legislatures the intention to communicate directives that advance their purpose in legislating and maximize social welfare. On another (possibly complementary) understanding, purposivism and pragmatism are directions to judges on how to proceed when legal texts' communicative content, and hence contribution to legal content, is indeterminate. Judges should resolve such indeterminacies—should interstitially make law—in a way that advances legislative purpose and social welfare. All of this is consistent with the standard picture.

In short, someone who subscribes to the standard picture is not thereby committed to any prescriptive theory of legal interpretation. When I say that nearly all practitioners implicitly accept the standard picture, I am only suggesting that they implicitly accept that legal texts' communicative content *just is* legal content. I am *not* suggesting that practitioners all agree on normative questions regarding how judges should interpret indeterminate communicative content. Prescriptive theories of legal interpretation like textualism and intentionalism purport to resolve such questions, and there is healthy debate as to which of those theories is best. And yet those theories are sufficiently similar in application that their adherents can still agree on how courts ought to resolve the vast majority of legal disputes that tend to arise in practice.

Finally, it is also important to recognize that the standard picture is not a complete theory of law. Like the moral impact theory, the standard picture only directly answers the question of legal content. It does not answer the question of legal validity: it does not explain what counts as a legal text or other source of legal content. The standard picture does, however, pair naturally with a common positivist answer to the question of legal validity: the rule of recognition.[63] On one understanding, the rule of recognition is a complex social practice that directly or indirectly picks out all the sources of legal content for a legal system. The role of the standard picture is to tell us how some of those sources—namely, legal texts—determine legal content.[64] Combining the rule of recognition and the standard picture thus yields a more complete positivist theory of law (though it still leaves open the question of how custom determines legal content).

63. *Cf.* H.L.A. Hart, The Concept of Law (2012), at 94.

64. We might understand the standard picture as a conceptual constraint on how legal texts determine legal content, or we might more modestly understand it as a component of the rules of recognition we are familiar with—i.e., as part of the social practices underlying the legal systems we know. I am content with either of these positions.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

B. Refining the Standard Picture

Let us now consider four objections to the standard picture advanced by Greenberg and others. I call these the objections from (1) indeterminacy, (2) inconsistency, (3) substantive canons, and (4) overgeneration. Answering these objections will give us opportunity to further refine the standard picture.

The objection from indeterminacy. As we saw above, there are multiple ways of interpreting a legal text's communicative content; we might, for instance, look to its ordinary meaning, to what its author intended to say, or to what its author should have said in light of the text's purpose or the goal of maximizing social welfare. Sometimes (though, in practice, not very often), these different methods of interpretation yield multiple plausible interpretations of a legal text's communicative content. The trouble, according to Greenberg, is that when there are multiple plausible interpretations of a legal text's communicative content, the standard picture does not tell us which interpretation coincides with legal content.[65] (The moral impact theory, he says, "supplies what is missing" by showing us why communicative content matters—it matters only insofar as it bears on a legal text's moral impact—thereby giving us a normative criterion by which to see which interpretation coincides with legal content.[66])

Greenberg uses *Smith* to illustrate.[67] Assuming that the majority and dissent had plausible readings of the statute's communicative content, the standard picture does not tell us which reading coincides with legal content. The standard picture does not answer whether the statute prescribes a sentencing enhancement for using a firearm in any way or only for using a firearm as a weapon. Greenberg concludes that the standard picture is therefore "badly underspecified."[68] Unlike Greenberg, I take the standard picture's neutrality in such cases to be a feature, not a bug. It is to the standard picture's credit that it does not try to resolve hard cases but instead explains why hard cases are hard. *Smith* was a hard case (after all, it divided the Supreme Court). It was hard because the statute's communicative content was indeterminate.

I take it that a desideratum of a metaphysical account of what determines legal content is that the account be consistent with any mainline

65. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1291; Greenberg, *Legislation as Communication*, *supra* note 3, at 248; *see also* Baude & Sachs, *supra* note 2, at 1089–1090.

66. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1328–1329.

67. *Id.* at 1331. I doubt that Greenberg's attempt to bypass controversy over what the statute communicates works. Even on his theory, it seems we need to know what the statute communicates before we can decide what its moral impact is. Thus, determining what the statute communicates seems prior to determining its moral impact (and hence prior to determining its legal content on Greenberg's theory). *Cf.* Marmor, supra note 4, at 19. If this is right, then the moral impact theory brings us no closer to resolving cases like *Smith* than the standard picture does.

68. Greenberg, *The Dependence View and Natural Law*, *supra* note 3, at 304.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

prescriptive theory of legal interpretation. Such an account should not aim to reduce disagreement between textualists, intentionalists, and the like, but only to explain such disagreement where it occurs. The standard picture does just that: if a legal text's communicative content is indeterminate, its contribution to legal content is too, and there is room to reasonably disagree over how a court should apply the text. Someone who subscribes to the standard picture can still hold that, after communicative content runs out, courts should engage in moral reasoning (even moral-impact-style reasoning) to make new legal content. The standard picture only denies that such moral reasoning tells us anything about existing legal content.

The inconsistency objection. A legal text's communicative and legal content sometimes seem inconsistent. William Baude and Stephen Sachs imagine a criminal statute stating "Any person who sends live geese through the mails shall be fined under this title or imprisoned not more than two years, or both."[69] The statute seems to communicate that *all and only* those people who send geese through the mails are guilty of the offense. But we know this is not the whole story. Someone who sends geese through the mails but is insane or acting under duress is *not* guilty of the offense. Moreover, someone who does not send geese through the mails but attempts or conspires to do so *is* guilty of an inchoate offense. The statute's legal content is thus limited by defenses and augmented by liability for inchoate crimes that apply by default to all criminal offenses—none of which is reflected in the statute's communicative content.

Lawrence Solum raises a similar objection using the First Amendment. He writes: "[T]he content of free speech doctrine is legal content, but this doctrine far outruns the communicative content of the First Amendment."[70] More problematic still, free speech doctrine contradicts the amendment's communicative content. The amendment states that "*Congress* shall make no law . . . abridging the freedom of speech."[71] Thus, its communicative content appears to concern only the legislative branch. Yet free speech doctrine limits the power not just of the legislative branch but of the entire federal government (and by incorporation via the Fourteenth Amendment, limits the power of entire state governments).[72] So it seems that legal content not only outruns the amendment's communicative content but also contradicts its communicative content.

The problem with this style of objection is that it ignores how legal texts interact. Legal texts hardly ever function in isolation. A statute and judicial opinions interpreting that statute commonly bear on the same legal norm. The statute may generate indeterminate legal content by itself, while the

69. Baude & Sachs, *supra* note 2, at 1099–1100.
70. Solum, *supra* note 2, at 480.
71. U.S. Const. amend. I (emphasis added).
72. Solum, *supra* note 2, at 512 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964)).

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

statute and judicial opinions together generate more determinate legal content. The same goes for constitutional provisions and judicial opinions interpreting those provisions or statutes and regulations promulgated pursuant to those statutes. For this reason, it is imprecise to speak, as we have been, of "a legal text's legal content." Doing so too easily leads to the mistaken impression that legal texts must each give rise to distinct legal norms. We should instead speak of "a legal text's *contribution to* legal content"—meaning its contribution to the entire set of legal norms for a given legal system. This suggests:

> THE STANDARD PICTURE (REVISED 1). A legal text's communicative content *just is* its contribution to legal content.

The answer to Baude and Sachs's objection should by now be clear. They conflate a single legal text's contribution to legal content with legal content after all such contributions are taken into account. The communicative content of the statute they imagine is exactly what they think it is—a general prohibition on sending geese through the mails. On the standard picture, that communicative content *just is* what the statute contributes to legal content. The existence of defenses and inchoate offenses do not undermine that conclusion because the communicative content of *other* legal texts fixes those defenses and inchoate offenses.[73] Multiple legal texts bear on the goose-mailing offense that Baude and Sachs imagine, and not surprisingly, we must look to what *all* the relevant legal texts communicate to know what legal content requires.

The response to Solum is similar. The First Amendment, like many constitutional provisions, is vaguely worded. Because its communicative content is indeterminate, its legal content is too.[74] Most free speech doctrine arises not from the First Amendment itself but from judicial opinions interpreting the amendment.[75] Now, this still does not answer Solum's main point, which is that free speech doctrine seems to *contradict* the amendment's communicative content. But the standard picture has resources to explain even

73. In fairness to Baude and Sachs, even though they criticize the standard picture, their position may not be too different from the one I articulate here. *See* Baude & Sachs, *supra* note 2, at 1093–1097 (arguing that there is a "law of interpretation" that instructs courts how to interpret other legal texts). That said, I think that Baude and Sachs are wrong to claim that originalism is part of the content of our law.

74. Solum claims that there are four additional reasons "why legal content can differ from communicative content," namely problems of vagueness, ambiguity, gaps in communicative content, and conflicts between the communicative content of various legal texts. Solum, *supra* note 2, at 509–510. The first three reasons concern indeterminate communicative content. In such cases, the standard picture simply says that legal content is indeterminate too. This poses no objection to the standard picture. Our revised formulation of the standard picture takes care of the last reason: because the standard picture concerns only each legal text's *contribution* to legal content, conflicts between the communicative content of various legal texts do not pose a problem for it.

75. Put another way, most First Amendment law, like most constitutional law in general, is common law.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

this apparent contradiction. First, we sometimes understand an utterance to communicate something other than what its words ordinarily mean. We observe this in everyday conversation whenever we perceive that our interlocutor is misspeaking: our interlocutor says one thing, but we know he means another. It is possible that courts understand the First Amendment to be an instance of misspeaking: it says "Congress" but actually communicates a limit on the power of the entire federal government.

Second, and more importantly, even if we assume courts have misinterpreted the First Amendment's communicative content, the rule of recognition in the United States makes the Supreme Court the supreme interpreter of the Constitution. The Court's opinions are thus controlling in matters of constitutional law, and what they communicate, not what the Constitution communicates, ultimately determines the governing legal norm. The Court's opinions applying the First Amendment against the entire federal government thus explain why free speech doctrine is as it is: those opinions' contribution to legal content supersedes the contribution of the First Amendment itself. The gap between free speech doctrine and the First Amendment's communicative content therefore does not undermine the standard picture.[76]

The objection from substantive canons. Greenberg also claims that the standard picture cannot account for common canons of interpretation, such as the rule of lenity (ambiguity in criminal statutes should be construed in favor of the accused), the absurdity doctrine (courts should not interpret a statute to yield absurd results), or the practice of reading a mens rea requirement into a criminal statute that does not expressly contain one.[77] These canons, Greenberg says, do not aim to uncover legal texts' communicative content but are instead "rules of thumb for working out the moral consequences of statutes."[78] He concludes that the standard picture therefore cannot explain how courts interpret legal texts in practice.

Although this objection is more complex than the prior one, it is related, and the response is similar. Some canons—like *expressio unius est exclusion alterius*, the expression of one thing implies the exclusion of others—are what some commentators call "semantic" canons.[79] These are essentially Gricean maxims that courts use to work out pragmatically communicated content.[80] Because semantic canons help decipher what a legal text's

76. Hrafn Asgeirsson refers to the objections from inconsistency and from substantive canons jointly as the "gappiness problem." Hrafn Asgeirsson, The Nature and Value of Vagueness in the Law (2020), at 6. Asgeirsson's discussion of the standard picture is subtle and informative, and I do not have space to adequately address it here. But I believe his position is similar to the one I ultimately adopt below.

77. Greenberg, *supra* note 2, at 76; Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1333; *see also* Baude & Sachs, *supra* note 2, at 1089.

78. Greenberg, *The Moral Impact Theory*, *supra* note 3, at 1333.

79. *See, e.g.*, Scalia & Garner, *supra* note 56, at 101. "Semantic canons" is a misnomer; "pragmatic canons" would be more accurate, as these canons generally identify pragmatically communicated content.

80. *Cf.* Grice, *supra* note 62, at 28.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

communicative content is, they pose no problem for the standard picture. The canons that Greenberg cites, however, are different. They are "substantive" canons that prescribe presumptions for or against deciding cases in certain ways. One response to Greenberg's objection is that, insofar as legislatures intentionally legislate against the backdrop of substantive canons or can be reasonably understood as doing so, those canons are relevant to legal texts' communicative content. That is, perhaps substantive canons are *context* that partly determines communicative content.

But we need not rely on anything so empirically tenuous to refute this objection because substantive canons are themselves legal norms grounded in legal texts. Substantive canons are legal norms directing courts to take certain considerations into account when interpreting legal texts whose communicative content is indeterminate. When courts apply substantive canons to privilege one plausible interpretation of a legal text's communicative content over another, they are not searching for a legal text's moral impact—they are just following the law. On the standard picture, the communicative content of certain legal texts (mostly judicial opinions) determines the legal norms we call "substantive canons." Those canons, in turn, direct courts to privilege certain interpretations of other legal texts, where it would otherwise be indeterminate what those texts' communicative content, and hence contribution to legal content, is.

Dale Smith gives a more nuanced version of this same objection based on what he calls "retrospectively operating modifier laws."[81] For instance, in the United Kingdom, §3(1) of the Human Rights Act 1998 provides that "primary legislation and subordinate legislation must be read and given effect in a way which is compatible with [the European Convention on Human Rights]." Significantly, this section controls courts' interpretation of not only future legislation but also *previously enacted* legislation. Although §3(1) does not alter any legal text's communicative content, its effect may be to retrospectively modify some legal content. Suppose a statute was enacted prior to §3(1) with communicative content φ. The standard picture holds that the statute's contribution to legal content is also φ. After the passage of §3(1), the statute's communicative content remains φ, but legal content may have changed.

This version of the objection fails for much the same reason given above. Section 3(1) communicates that courts must interpret legal texts a certain way and so, on the standard picture, creates a legal norm requiring courts to interpret legal texts that way. That norm may require courts to revise their prior interpretation of some legal texts. Even though the express language of those texts has not changed, courts may be legally required to enforce a different plausible interpretation of the texts' communicative content than they did previously. That is not to say that courts may now ignore communicative content. It is only to say that, where legal texts'

81. Smith, *supra* note 2, at 520.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

communicative content is indeterminate, courts must now privilege plausible interpretations of communicative content that are consistent with the Convention on Human Rights over those that are not. All this shows is that we must look to what *all* the relevant legal texts communicate to know what the content of the law is. None of this poses a problem for the standard picture.

The overgeneration objection. Another objection is that, clearly, not everything a legal text communicates is legal content.[82] For instance, statutes often include legislative findings. The Americans with Disabilities Act includes the legislative finding that "some 43,000,000 Americans have one or more physical or mental disabilities."[83] This proposition obviously is not legal content. The same problem occurs in judicial opinions, which often stretch to dozens of pages and begin with a detailed recitation of the facts of the case. No one thinks that everything a judicial opinion communicates is legal content. Rather, the received view is that a judicial opinion's contribution to legal content is the ground on which it was decided, its *ratio decidendi*. In these and similar ways, it seems that the standard picture overgenerates legal content.

Defining the standard picture in terms of communicative content—understood as *all* the information a legal text conveys in the context in which it is uttered—is too crude. Declaratory communicative content in a legal text may be evidence of what that text contributes to legal content. But declaratory communicative content does not contribute anything itself to legal content. What interests us is not everything a legal text communicates but rather just the text's *imperatival* communicative content—or as I will say, the *directive* that the text communicates. (Here, I intend the extension of "directive" to include not only commands but also the bestowal of powers, permissions, etc.) Properly understood, it is the directive that a legal text communicates that the standard picture identifies with the text's contribution to legal content:

> Standard Picture (Revised 2). The directive that a legal text communicates *just is* its contribution to legal content.

This is what I take to be the true standard picture—the picture that best represents how practitioners standardly believe legal texts determine legal content. So where does that leave us? Assuming that the answer to the question of legal validity is something like a Hartian rule of recognition—which I have not argued for here—a legal system works roughly as follows. The rule of recognition, a complex social practice, picks out every legal text and other source of legal content for that legal system. Each legal text

82. *See* Greenberg, *supra* note 2, at 73.
83. 104 Stat. 327, 328, 101 P.L. 336 (1990).

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press

communicates some directive, which according to the standard picture, *just is* what the text contributes to legal content. Insofar as it is determinate what the directive is, the text's contribution to legal content is determinate; but insofar as it is indeterminate what the directive is, the text's contribution to legal content is indeterminate.

We must look to *all* relevant legal texts (and customs) to ascertain what the content of the law is. Sometimes, even though it is indeterminate what directive one legal texts communicates, a directive from another legal text (e.g., a substantive canon) resolves that indeterminacy and renders legal content determinate anyway. At other times, different legal texts' directives conflict with one another, and unless the rule of recognition specifies that one directive supersedes the other, the result is that legal content as a whole is indeterminate.[84] Much more needs to be said about what counts as a legal text and how various legal texts interact, but this at least gives an idea of how the standard picture fits into a broader positivist theory of law.

Recall Greenberg's contention that the moral impact theory is the "fundamental" explanation of how legal texts determine legal content while the standard picture is the "superficial" explanation. His claim is that, as it happens, the moral impact theory and the standard picture are roughly coterminous: a legal text's moral impact is usually the same as the directive it communicates, so both accounts pick out roughly the same norms as legal content. Practitioners can behave as though the standard picture is true because the standard picture happily coincides with the moral impact theory most of the time. The problem with this response should by now be clear: it is unmotivated. This sort of response makes sense only if objections to the standard picture succeed. If, as argued above, those objections are unfounded, then there is no reason to posit a more fundamental explanation behind the standard picture.

As a final caveat, I have been assuming that there is a single answer to how all legal texts determine legal content, notwithstanding the diversity of legal texts in most legal systems. The standard picture easily explains how certain legal texts like statutes, regulations, executive orders, and judicial orders determine legal content. But it struggles more to explain how judicial

84. Greenberg raises two other objections to the standard picture, which can be dealt with briefly. First, he presupposes that a legal system, by its nature, should ensure that legal norms are morally binding. Greenberg, *supra* note 2, at 84–85. The standard picture makes some legal norms not morally binding, such that "legal systems cannot generally operate as they are supposed to." *Id.* at 96. Greenberg concludes that we thus have "serious reason to doubt" the standard picture. *Id.* at 101. But even if it is true that a legal system is defective insofar as it fails to ensure that legal norms are morally binding, why would *a theory of law* be defective insofar as it fails to ensure that legal norms are morally binding? To presuppose moral bindingness as a desideratum for a theory of law is just to beg the question in the positivism-antipositivism debate. Second, Greenberg argues that the standard picture wrongly identifies communicative content (which he says is merely propositional) with legal content (which is normative). Greenberg, *The Dependence View and Natural Law*, *supra* note 3, at 301. Our revised version of the standard picture addresses that issue: the directive that a legal text communicates is normative.

opinions determine the content of common law. Certainly, courts must communicate something to create common law, but they need not explicitly communicate any directive to do so. Perhaps all judicial opinions at least implicitly communicate some directive (based on the context in which they are rendered, which includes a practice of precedential reasoning). But this idea would have to be further fleshed out. None of this detracts, however, from the standard picture's explanation of how legal texts like statutes and regulations determine legal content.

C. Succeeding Where the Moral Impact Theory Fails

The standard picture avoids the objections to the moral impact theory that we saw above. First, it accounts for gravely immoral legal content: legal texts like the Fugitive Slave Act communicate directives just as other legal texts do and contribute to legal content just as other legal texts do, even though the directives that they communicate are gravely immoral. Second, the standard picture does not allow that an entire legal community can be systematically mistaken about the content of its law. To be systematically mistaken in this way, the community would have to be systematically mistaken about what utterances in its language communicate, which is not possible. Third, the standard picture aligns with how practitioners normally reason and argue about legal texts: practitioners *do* reason and argue about what directive a legal text communicates; they may not use those exact words to describe what they are doing, but the description is apt.

Fourth, and most interestingly, the standard picture explains why we so often agree on legal content: we agree as often as we do because it is normally clear enough what directive a legal text communicates to resolve those legal questions that tend to arise in practice. Legal texts are usually carefully drafted with certain run-of-the-mill cases in mind. The directives that they communicate, and hence their contributions to legal content, are usually determinate as to such cases (which is, of course, consistent with their being indeterminate as to other unanticipated or exceptional cases). Thus, the standard picture suggests that we agree on legal content as often as we do because it is usually clear to us how the directives that legal texts communicate apply to those cases that actually arise—and those directives *just are* legal content.

Although I disagree with Greenberg on many points, his work has been both influential and fruitful. He is right to draw our attention to the gap between legal texts and legal content, and he is right to question the standard picture, which remains an underdeveloped component of a broader positivist theory of law. There is more work to do on how the standard picture fits into a positivist answer to the question of legal validity. There is also more work to do on how the standard picture accounts for how different kinds of legal texts, particularly judicial opinions, create legal content. But these tasks are beyond the scope of the present paper. What I hope to have accomplished here is to make progress toward vindicating our

ordinary understanding of how legal texts determine legal content by showing that the standard picture remains a viable answer to that question and one that better explains legal practice than the moral impact theory.

https://doi.org/10.1017/S1352325221000276 Published online by Cambridge University Press