On Moral Impact and Legal Practice

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Bill Watson, In Defense of the Standard Picture: What the Standard Picture Explains That the Moral Impact Theory Cannot, 28 **Legal Theory** 59 (2022).

Some recent debates in general jurisprudence concern so-called moral impact theories of law, chiefly in the version proposed by Mark Greenberg.[1] Greenberg's theory has both staunch supporters and fierce critics. There are also a good number of scholars who look on these debates with perplexity and some dismay. Greenberg provocatively portrays law as the moral impact of institutional action. He presents his moral impact formula as the "legally correct" way to figure out the law's content on the part of practitioners. His proposal has attracted some fine scholarship denouncing ambiguities within the account, and inconsistencies between the account and legal practice.

Watson's piece takes these concerns a valuable step further. He argues that Greenberg's theory distorts not only what practitioners count as law, but also *how they reason* to that effect. This is the kind of contribution from which one can learn, positively, about legal reasoning and practice, rather than just, negatively, where someone else goes wrong.

There are four aspects I wish to highlight about Watson's contribution. Its first valuable aspect is that Watson spells out what he counts as a standard of success of the accounts under discussion. An account of what determines legal content, he says, "should be largely consistent with practitioners' attitudes and behavior" (P. 71). It is useful that he spells this out because Greenberg himself is less than fully clear about whether his theory aims at consistency with legal practice. But whether the theory does, or should, is decisive to the *kinds* of considerations and arguments that can count against it. Watson would have done well to problematize and defend, rather than merely "assume" (P. 71), this standard of success, though it is helpful that he brings it in and appeals to it consistently.

The second valuable aspect is the first major critique that Watson addresses at Greenberg. In Watson's words: "First, the theory is 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" (Pp. 60-61).

Someone had to say it. Earlier criticisms of Greenberg's theory had focused on problems in the account's catch. They had focused on which legal duties, rights, powers, etc. Greenberg's account misses, or on which duties, rights, powers, etc. the account counts as legal but legal practice doesn't. They had focused, in short, on *what* Greenberg and legal practice count as legal content, but not on the *way* they go about discerning that content. As Watson puts it, "[i]f the [moral impact] 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*" (P. 73, emphasis original). Watson's criticism is not simply negative. It is not simply a claim about what practitioners do *not* do (ie appeal to moral impact). Watson has some intriguing things to say about how practitioners *do* go about discerning the law. But the reader has to wait until the final part of the article; I refer to this below.

The third valuable aspect of Watson's contribution is its second major critique of Greenberg: "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…" (P. 61).

Greenberg need not, indeed does not, deny that practitioners are in widespread agreement about legal propositions and some of their sources. But, on the moral impact theory, as Watson says, much of what they agree on is "open to reasonable dispute". That is because, on Greenberg's account, the law is the moral impact of institutional action. Moral impact assessment is an open-ended moral judgement. To be sure, such moral judgement might *itself* recommend – Greenberg sometimes notes – that certain decisions not be morally second-guessed. Moral impact assessment might *itself* tell against reopening what was settled and agreed upon, *given* (say) the moral need for certainty or fair warning. But even where that is so, moral judgement remains in the driver's seat. Moral judgement – on Greenberg's theory — is ultimately decisive, and can therefore, *legally speaking*, be brought back in at any time. As Watson points out, "[p]arties to a legal dispute have every incentive to disagree over legal content" (P. 75). It should therefore surprise Greenberg that they don't so do more often. For, instead,

> 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; 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. (P. 74.)

This second critique is closely connected to the first one. It is perhaps more closely connected than Watson appreciates. The nature of the ultimate considerations to which practitioners appeal, in working out what the law is on some matter, is not a moral impact assessment but a baseline consensus. Of course, an incomplete and variable consensus. But a consensus nonetheless. A consensus about what? Not, primarily, about *which* duties, rights, powers, etc. make up the content of the law, but about the *way* to establish these. It is a consensus about fundamental methods of legal reasoning.

The fourth valuable aspect I wish to draw attention to feeds into the previous three. It emerges as Watson, in the final part of his article, sets out to "refin[e]" what both he and Greenberg call the "standard picture" (Pp. 76ff). Greenberg has coined the term "standard picture" to refer to what he takes to be an assumption or understanding underlying much philosophical and doctrinal thought about law. On the standard picture, as Greenberg portrays it, legislation – and law-making in general – is an instance of communication and shapes the law precisely in accord with its communicative content. Watson's aim is to refine the standard picture by way of defending it – as his title suggests.

What is insightful about Watson's refinement of the standard picture, in my view, goes to suggest that the standard picture must in fact be abandoned. Watson has some very reasonable remarks to make, for example, about how different legal sources or decisions "interact" with one another (Pp. 81-82). Legal rules on defences or inchoate liability, for example, qualify what would otherwise be the legal meaning of offence-creating provisions individually considered. It is the bread and butter of legal reasoning that different sources (legislative, judicial, constitutional…) must be *read together* to establish what the law is on some matter. Both Watson and Greenberg (and others) rightly favor talk of a text's "contribution" to legal content. But Greenberg perhaps sees more clearly than Watson that such systemic dimension of legal reasoning tells against the plausibility of explaining law on the model of ordinary communication – which is an individual, not a multi-person, affair.

Watson's elegant discussion of substantive canons of interpretation (Pp. 83ff), *pace* Watson, points in a

similar direction. What are sometimes known as substantive canons of interpretation, such as the rule of lenity or the absurdity doctrine, are themselves legal provisions, deriving ultimately from some law-making conduct – what Watson calls "legal texts". Watson is right that a statute's legal meaning may be changed through the enactment of a further decision to that effect (he discusses Dale Smith's example of the Human Rights Act 1998 altering the legal meaning of prior legislation).[2] He is right that the question of how later decisions bear on an earlier decision's legal meaning is a matter of law. But just that diachronic dimension of legal meaning sits uneasily with the logic of ordinary communication, whose meaning or content is fixed at the time of speaking in light of language conventions in force *then*.

Nor can the logic of ordinary communication, in and of itself, tell "the directive that the text communicates" from the rest of its communicative content (P. 85). Watson distinguishes between the directive in a legal text and everything else the text communicates in order to forestall the objection that the standard picture overgenerates law. For not everything in, say, the text of a statute or a judicial opinion goes to shape the law's content. That is right – but Watson neglects to say that the *way* one gets from the marks on the paper (or the sounds in the room) to a directive or legal rule *is a matter of law*. Stare decisis is a legal doctrine; so are basic methods of statutory or contractual construction.

I think Watson debars himself from fully seizing the constructive potential of his critique by excluding from his discussion the question of "what makes something a legal text" to begin with (P. 67). He also calls this question "the question of legal validity" (P. 67). Watson is overly charitable in justifying Greenberg's silence on that question. As the core of Watson's critique insinuates, law regulates how certain facts make law, and in so doing it regulates which facts do – indeed which *acts* do. The latter question cannot be detached from the former. Standards of legal reasoning are a matter of law, which self-regulates in a manner that escapes the logic of ordinary communication. It is proper to deny that law is the moral impact of institutional action. But one must not for that reason embrace the other horn of a dilemma which is likewise of Greenberg's making.

1. Mark Greenberg, *The Moral Impact Theory of Law*, 123 **Yale L.J.** 1288 (2014) is the most representative work.
2. Dale Smith, *The practice-based objection to the 'standard picture' of how law works*, 10 **Juris.** 502 (2019).

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