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THE SOCIAL IMPACT THEORY OF LAW*

abstract

Margaret Gilbert's work on sociality covers a wide range of topics, and as she puts it "addresses matters of great significance to several philosophical specialties – including ethics, epistemology, political philosophy, philosophy of science, and philosophy of law – and outside philosophy as well" (Gilbert 2013, p. 1). Herein I argue that Mark Greenberg's recent call to eliminate the problem of legal normativity is well motivated. Further, I argue that Gilbert's work on joint commitment, and more specifically obligations of joint commitment, allows us to move beyond the problem of legal normativity while cashing out H.L.A. Hart's thesis that moral and legal obligations are distinct.

keywords

legal normativity, Hart-Dworkin debate, legal positivism, interpretivism, joint commitment

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Intro Margaret Gilbert’s work on sociality covers a wide range of topics, and as she puts it “addresses matters of great significance to several philosophical specialties – including ethics, epistemology, political philosophy, philosophy of science, and philosophy of law – and outside philosophy as well” (Gilbert 2013, p.1). I want to explore the implications of Gilbert’s work for an ongoing debate in philosophy of law, and more specifically a recent call to move beyond the debate by eliminating the problem at its heart.

Herein I argue that Mark Greenberg’s recent call to eliminate the problem of legal normativity is well motivated. However, I argue that Greenberg’s own solution, the Moral Impact Theory of Law (MIT), is only a likely candidate if one falsely relies on the assumption that only moral facts can provide the type of normativity needed to fix legal content. Instead, I argue that Gilbert’s work on joint commitment, and more specifically obligations of joint commitment, allows us to move beyond the problem of legal normativity while cashing out H.L.A. Hart’s thesis that moral and legal obligations are distinct.

To be clear, it is not within the bounds of a paper of this scope to offer a robust defense of a Gilbertian-inspired theory of law based on obligations of joint commitment. Nevertheless I want to lay the groundwork for how Gilbert’s work on the normativity of joint commitment can help resolve an intractable debate in philosophy of law. My hope is that this will both re-enforce the importance of Gilbert’s work and also point to a fruitful new avenue of research in philosophy of law that holds the promise of advancing a new solution to the intractable problem of legal normativity.

The two systems theory: the problem of legal normativity

I. In this section I give a brief overview of the problem of legal normativity as it arises in the Hart-Dworkin debate. As such, I shall give rough and programmatic accounts of the two positions that form the main participants in the debate: positivists and interpretivists. My goal is to simply motivate the thought that the problem of legal normativity is rather intractable and to provide a general background for understanding the motivation for leaving the debate behind rather than finding a solution.

I.A Positivism For centuries the established view of law was natural law theory. Natural law theorists held, in varying degrees of sophistication, that law was derived from morality. On such a theory, the law of a given community is the application of moral principles to particular material and historical circumstances. One can see that the problem of legal normativity need not arise if a debate is occupied entirely by natural lawyers because legal obligations simply are moral

obligations according to natural law theories.

By contrast, positivists argue that law is a special class of norms that is determined entirely by social facts – namely facts about what officials in the legal system have done, thought, said, etc. For example, Hart argued that these social facts could be viewed from two points of view: the internal and the external (Hart 1997, pp. 89-91). From the external point of view, at its extreme, one could accurately describe the law in terms of the behaviors those engaged in the legal system. For instance, the law’s claim that subjects ought to ϕ could be reduced to the claim that officials in the legal system declare guilty and punish those who fail to ϕ . Thus, the external point of view remains thoroughly descriptive.

Of course, the external point of view fails to capture a basic fact about legal systems.

Practitioners view the content of the legal system as giving themselves and others *reasons* for acting in certain ways. However, this positing of a normative, internal point of view raises the question of what the relation is between these reasons and one’s moral reasons. Hart famously contended that there is no connection between the two on the grounds of a need for critical distance between the law as it is and as it ought to be (Hart 1958). Natural law, Hart thought, ran the serious danger of conflating the two. Hart, however, never seems to provide a *reason* for officials to adopt the internal point of view. For Hart it is a fact about legal systems that they obtain when a group does take such a stance toward a rule of recognition (1997, esp. pp. 115-117). Thus, the problem of legal normativity is the problem of explaining what is distinctive about the type of normativity that is endemic to legal systems.

Interpretivism as elaborated by Dworkin rests on the idea that law is characterized by fundamental disagreement, and yet is simultaneously used to justify the use of state power. Dworkin’s main issue with positivism is his contention that moral facts are necessary in order to determine the content of the law. Thus, he takes a strong stance against the positivist position that social facts alone can determine legal content.

Dworkin criticized Hart’s thesis that the law is totally dependent on social practices of rule following by pointing out that theoretical disagreements in the law abound. Legal practice is rife with examples of what appear to be disagreements over how the law is constituted. For instance, judges disagree about whether or not they are to interpret law based on the plain meaning of the texts, the intentions of the legislators, or the purpose of the law (Dworkin 1986, pp. 31-35). How can it be argued that officials agree on a rule of recognition when they so patently seem to disagree?

Dworkin argues that laws should be interpreted such that they best justify the social practices that surround them – especially the use of coercive force. In order to decide a case, Dworkin argues, judges must find the legal decision that best “fits” and “justifies” the legal practice at issue (1986, p. 52). An interpretation fits when it corresponds to past legal practice. Justification consists in assigning the value that makes the practice the most worth pursuing. Thus, interpretation requires that judges assign each legal practice a purpose, then argue that that purpose both best fits past legal practice and also presents the law in the best possible light. According to Dworkin, law generally has the purpose of justifying the use of state power-coercion. Thus, judges must evaluate past legal practices and justify them through the use of principles of political morality. What makes a practice distinctively legal is its particular purpose and the way it is tied to past practice. While interpretivism argues that we must present law in its *best* light, the possibility of immoral or substandard practices which the law must fit means that it remains possible that the best interpretation of a law is not necessarily the interpretation one would reach when arguing purely through principles of political morality, much less morality proper – thus maintaining a distinction between law and morality, but showing that legal obligations are a species of moral obligation.

**I.B
Interpretivism**

I.C Intractability Perhaps the most striking feature of the forgoing debate is that neither set of reasons seems to directly confront the other. The positivist claims that the purpose of law is to guide action – and thus that the purpose of law is to authoritatively settle disputes over what subjects are obligated to do or forbear doing. Given widespread moral disagreement the positivist will claim, if law’s normativity rests on moral principles it will be unable to serve this function. By contrast, interpretivists’ claim that widespread disagreement over the facts that could determine legal content – e.g., the proper interpretive methodology – prevents the law from guiding action in this way. Instead the interpretivist claim is that law is used to justify coercion rather than to guide action – and this requires the invocation of moral principles. The crucial thing to note is that to a degree neither directly confronts the main claims of the other – in the end the question is more a matter of style or intuition. If one sees disagreement as the primary phenomenon of law then one is likely to agree with interpretivists. However, if one sees the law’s distinctive feature as its functioning authoritatively then one is likely to agree with the positivists. Nothing prevents one from acknowledging both that there is deep controversy in the law, and that it manages somehow to guide conduct by functioning authoritatively. Consequently, neither side can claim to have solved the problem of legal normativity.

II. Eliminating the problem In a recent turn in the literature there is an attempt to move beyond the Hart-Dworkin debate by eliminating, rather than solving, the problem of legal normativity. One can do so, these authors suggest, by rejecting the thought that law creates its own distinctive kind of normativity in addition to moral or prudential concerns. The question of legal normativity is eliminated if the obligations created by legal practices are not of a distinctive kind. In this section I canvass two types of arguments for eliminating the problem of legal normativity – one from positivists and the other from interpretivists.

II.A Oughts from the legal point of view Hart has come under serious criticism for his theory of internal and external reasoning. While reference to the internal point of view can explain how it is that an official who internalizes the system’s secondary rules takes herself to be obligated by them, it cannot explain how it is that she can view *others* as having those obligations. That is, one can sensibly speak of being obligated to act a certain way based on one’s own self-interest or desires. By contrast, it does not seem that one could take one’s own self-interest, inclinations, or desires as giving others reasons for acting in the same way. It is plausible that my acceptance of the authority of the legal system as legitimate gives *me* a reason to do as commanded, but I cannot claim that *my acceptance* likewise gives *you* a reason – and not because that would not be fair, but because that is not how reasons *work*. But that is just what one who adopts the internal point of view must do when directing legal judgments toward those who do not adopt the internal point of view. According to Shapiro, moral norms are the only types of norms that one can take to give others reasons (Shapiro 2011, pp. 186-188). Thus, Shapiro argues that those who approach legal rules from the internal point of view must either see legal norms as moral norms, or at least insincerely presume them to be moral norms. Thus, a certain stripe of positivist claims, a legal norm just is a moral norm from the legal point of view (2011, pp. 184-185). On this picture legal obligations are simply the moral obligations that the law takes those subject to have. Since the nature of law is such that the law takes itself to be authoritative, it is the case that the law takes others to be under obligations to obey it. Whether or not the obligations the law takes one to have are the obligations one actually has is beside the point. How then do we account for all the folk talk of *legal* obligations? Shapiro argues that when we distinguish *legal* obligations from *moral* obligations we are using the term ‘legal’ “perspectivally” rather than “adjectivally” (2011, pp. 184-188). Adjectival use,

according to Shapiro, attributes a property to a term, whereas perspectival use attributes the claim that the truth of the statement is relative to a certain perspective or point of view. Thus perspectival claims about what we are *legally* obligated to do need be no more mysterious than claims about what one ought to do from the perspective of Christian morality, utilitarianism, Marxism, etc. We do not assume that each of these perspectives generate new *types* of obligations, only (sometimes conflicting) sets of the same types of obligations – namely, moral obligations.

The point is that in order to be authoritative something must *give others* reasons. Since the law claims authority, one who accepts an authority must thereby take it to be giving others reasons, which one cannot account for solely by reference to the internal point of view. Thus the law comprises, for Shapiro at least, a set of putative moral norms that have been singled out by past social practices as legal norms – i.e., the moral obligations, rights, duties, and powers that the law attributes to its subjects.

Over the course of the last decade or so Mark Greenberg has developed an intriguing and novel account of the law (Greenberg 2014). Greenberg argues that for any given set of legal practices, there will be more than one set of rights, duties, powers, etc. that it can be said to generate. This is partly because, Greenberg argues, social facts cannot determine their own rules of application. For instance, given some legislative practice why do some actions contribute to the law and not others? Presumably committee notes could either be taken or not taken to contribute to the law. Purely social facts about what people have said, thought, and done will not be enough to determine which facts count as contributions to the law’s content and which do not because they cannot determine their own significance. To determine which facts contribute to the content of the law and which do not contribute, we need normative facts (Greenberg 2004). For instance facts about democratic legitimacy that rule out the private communications of legislators because of the value of transparency and predictability in democratic lawmaking.

If this is so, then positivist accounts lack the resources to choose among the different sets of moral obligations that are compatible with the social facts to settle on one set of obligations that comprises the legal point of view a given legal system. Greenberg however is able to meet this challenge in a straightforward and intuitive way by arguing that it is the legal point of view of any legal system is comprised by the *actual* moral obligations that are imposed by the legal practices of that system. Thus, for Greenberg the content of the law just is the difference (or as he puts it, the *impact*) legal practices make to our moral obligations.

Greenberg call his theory the Moral Impact Theory (MIT). MIT holds that the content of the law is the change in the total profile of moral rights and duties that a legal system makes through the practice of law (2014, p. 1323). MIT is ecumenical with respect to how laws impose these obligations. In the case of simple coordination problems like traffic regulation the law may impose this obligation not through any special moral credentials but rather simply by making a particular solution salient – at least, assuming people generally obey the law and that it is common knowledge among subjects of the legal system that this is so. The moral value of just or democratically legitimate legislation will also serve to contribute to a change in our moral obligations on most understandings and so can explain the importance of legal solutions to problems that do not fit standard coordination dilemmas.

The advantage here is that one is no longer presented with the problem of legal normativity, as traditionally understood. Instead of having to spend energy making sure that we are able to carefully derive legal obligations from social facts plus moral obligations we are able to engage in straightforward moral reasoning from start to finish. The moral upshot of our legal practices will also be the legal content of those practices.

II.B The Moral Impact Theory of law

Positivists will argue that the point of law is to guide action and that a legal system according to MIT cannot do that, or at least not well, because of moral disagreement. Greenberg could respond that moral disagreement notwithstanding the law is what it is, and sometimes we will simply disagree about that because some people draw the wrong moral conclusions for whatever reasons they do. Still, there is something in this argument that if laws are meant to guide action, then forcing people to engage in straightforward moral reasoning is likely to lead to a considerable amount of disagreement, and so considerable difficulty. We have then, a reason to look beyond MIT for a different theory.

III. The Social Impact Theory of law

What would an alternative to MIT look like? It is worth considering that both eliminativist positions gone over in the last section make essentially the same assumption. Shapiro assumes that there is no alternative to moralized concepts of obligation that will overcome the fact that legal officials have to see the law as giving reasons not just to themselves, but also to those subject to the law. Greenberg likewise argues that normative facts must play a role in fixing legal content since descriptive facts alone cannot do so. He seems convinced that moral facts are the only normative facts available, or at least the only ones fit to do the job of yielding determinate legal content. However, there is an alternative: Margaret Gilbert's account of the obligation of joint commitment, which I propose to call *social obligations*, as opposed to legal or moral obligations.

III.A Obligation and joint commitment

Margaret Gilbert has argued for introducing a type of obligation that has many of the features of moral obligations. This account relies on the notion of joint commitment. Gilbert applies this analysis to the notion of political obligation, but I think it usefully characterizes legal obligations (Gilbert 2006, 2013, ch. 17). I give a brief overview of her account before turning to its implications for the law.

A decision gives one a sufficient reason for acting as one decides. Gilbert notes that in the case of personal commitment the reason provided by a decision is amenable to acts of one's own will. That is, in the case of personal commitment it is only an act of one's own will that is needed to do away with the obligation – one need do no more than “change one's mind” in order to divest oneself of the reason for acting that followed from the decision.

This however, does not make sense in the case of a joint commitment. It must not be up to oneself to change the commitment, but rather up to the group – which Gilbert calls a plural subject – to change the commitment, including releasing individuals from the commitment. A particularly salient difference between the decision of one person and the decision of a group seems to be the fact that the decision of a group is not amenable to the will of its individual members – that is, the reason for acting in a certain way provided by a group decision is recalcitrant to removal by individual acts of will. Certainly individuals can decide to act contrary to their obligations in light of the group decision, but it is not within the power of individuals to “change the group's mind” on some issue.

Gilbert suggests that we cash out this notion of the recalcitrance of group decisions to individual acts of will in terms of parties to a joint commitment *owing* one another the object of that commitment (2013, pp. 392-394). This sense of owing captures the idea that one is not at liberty to simply change the joint commitment in the same way that one is with a personal commitment. Thus, according to Gilbert, a joint commitment gives rise to reasons for acting both for oneself and the other parties to the joint commitment. These reasons have the form of directed obligations insofar as one seems to own the object of the commitment to the others and vice-versa. That is each seems committed to all the others to the object of the joint commitment. It is a short step to the idea that a particular political community might be the object of a joint commitment. Further, it should be noted that the obligations thus generated are not moral

obligations, and so they do not seem to suffer from objections about voluntarism that abound in the literature on political obligations. Instead, the obligations are simply generated by the relation between members toward a particular community or way of life. They exert a rational pressure in the same way that decisions exert rational, rather than moral, pressure.

Good or just decisions might gain some normative force from the moral consequences or justifications for those decisions, but morally neutral or even bad decisions seem quite capable of generating obligations even if they fail to provide all-things-considered reasons because of their moral deficiencies. Similarly, while some joint commitments to just or worthy causes or groups might generate moral obligations, they need not do so. The obligations generated by joint commitments are a distinct type of normativity. They form, as it were, a part of the social-ontological landscape in which parties to joint commitments find themselves, and these circumstances and commitments are open to moral appraisal. We may find, upon reflection, that many of our joint commitments fail to generate all-things-considered reasons for acting in certain ways, but we should not blind ourselves to the social reality of these obligations lest we lose the capability to critically appraise these commitments, which might be the root cause of much that is morally undesirable.

What then are the prospects for the project of eliminating the problem of legal normativity given the above argument for the addition of a class of obligations that are neither moral nor legal, but rather social? On this view then, which I call the Social Impact Theory (SIT), joint commitments to settle disputes focus on the authorizations of institutions committed to the articulation, explication, adjudication and enforcement of our social obligations. The rules that such officials recognize, promulgate, enforce, and practice give rise to legal obligations, which are just various descriptions and entailments of our pre-existing social commitments – legal normativity is just an expression of rational commitment to group decision-making. Thus SIT, like MIT, has no need to posit a unique type of normativity.

With respect to solving Shapiro's problem, the social obligations SIT posits can play the role of giving others reasons, since they constitute directed obligations. Thus, if such social obligations of joint commitment were the obligations that we see as legal obligations, then they could serve to explain the normativity of legal obligations that officials address to subjects of the legal system. While a given subject's all-things-considered reasons might conflict with her social obligations as specified by the legal system, judges nevertheless are authorized to enforce only the social obligations, and thus can avoid charges of irrationality or insincerity of taking other to be bound by reasons they do not recognize. More often perhaps the conflict is not one of the subject morally obliged to act contrary to law, but the subject who chooses to ignore the law out of self-interest or disinterest. Here too SIT fairs better than MIT insofar as SIT builds in the notion that personal commitments (or preferences, desires, decisions, etc.) and joint commitments might contain different, even conflicting, content while remaining valid for the same individual.

What of Greenberg's contention that social facts alone cannot fix the content of the law? It seems to be a brute capacity of humans that we are able to form commitments, and also joint commitments (Gilbert 1992, pp. 392-407). However, these are not moral commitments, they are social commitments. Is it possible that any number of obligations might attend these joint commitments, such that only moral facts have the ability to determine the content of our social obligations?

A full exploration of this issue is beyond the bounds of this paper, but the following thoughts indicate a negative answer. To return to an earlier point, it seems possible that one can form morally repugnant joint commitments. For example, one can form a joint commitment to execute a murder, theft, etc. While one may be morally obliged *not* to commit these acts it

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nevertheless seems strange to argue that fellow thieves owe nothing to one another. At the least such view is contrary to common sense judgments against turning on compatriots even when one compact involves morally dubious or repugnant goals. We might agree that all-things-considered reasons entail that compatriots to a morally repugnant group should turn on one another, but we are likely to retain certain judgments against the betrayal despite thinking it justified on the balance of reasons.

Second, the fact that there is this disagreement does not seem to hold the same force that it does against positivism. Disagreement might make it difficult to ascertain the content of the obligations but on SIT it is not conforming behaviors that gives the legal content their normative force, but the obligations of joint commitment. Just because one can reasonably posit a number of different obligations for some given joint commitment is no greater an obstacle than that one can posit a different number of moral obligations as arising from some legal practice. To the contrary, MIT requires convergence in moral reasoning to overcome disagreement, whereas SIT only requires ascertaining which social facts obtain among the possibilities. If I were betting, I would bet on the sociological task being completed before the moral one.

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