15 Against Legal Pragmatism
Greenberg and the Priority of the Moral*

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INTRODUCTION

I will argue against a pragmatist-*ish* view of law. The target of my argument is Mark Greenberg's theory of law. In a recent series of papers, Greenberg advances a novel and thoroughgoing attack on legal positivism.[1] He argues, in essence, that without appeal to normative considerations or "value facts," as he calls them, social facts (or "law practices," for Greenberg) cannot determine the content of law.[2] Law, for Greenberg, is fundamentally a function of its significance in the circumstances. In this respect, I will suggest, although not quite pragmatist, his view is a pragmatist-*ish* view of law.[3] So far as positivists take social facts to be the sole or primary determinants of law, then, it must fail as a theory of law. It is this aspect of his view that, I argue, raises the difficulties I outline below.

In its place, Greenberg defends an alternative conception of law. On this view, the law of a community consists in part of the community's *moral profile*. The moral profile of a community is the set of rights, obligations, and permissions that exist in a community given its relevant social circumstances.[4] The law of a community, Greenberg argues, is that part of the moral profile that has come to obtain in characteristic ways.[5]

I will argue that though cogent, Greenberg's alternative conception of law lacks some of the basic features ordinarily thought to be characteristic of law. In particular, I argue, Greenberg's theory of law lacks the unity and stability that are ordinarily associated with it. Greenberg argues that the contribution that law practices make to law depends on their moral significance in the circumstances.[6] Only thus can law practices rationally determine the content of law. I will argue that, notwithstanding this requirement, law also coheres as a system of rules or propositions that persists over time, despite changes in the moral circumstances of a community, and its moral significance in these circumstances. If, as Greenberg insists, law practices can only contribute to legal content to the extent that the underlying value facts so dictate—that is, if, as Greenberg suggests, the *ultimate* determinant of which social facts form part of the law practices, and the precise way in which they contribute to law, is itself a question of how they ought to—then

law cannot have this distinctive feature. I will conclude that it must, at the very least, be possible to specify which are the relevant social facts of the community as those that contribute to the content of law, independently of the relevant value facts. Only thus can one explain law as a unified system of rules or propositions that persists through time and throughout changing circumstances, notwithstanding the changes in the moral values and circumstances of the communities in which it persists.

I will begin by setting out Greenberg's objection to positivism and demonstrating the depth and force of the problem that this raises for positivists. Unlike previous challenges, Greenberg denies that positivists can even explain the *posited* law. His challenge thus goes deeper than Ronald Dworkin's attacks on legal positivism.[7] I will then turn to Greenberg's alternative conception of law. Greenberg's view meets the objections that he raises for positivists, while at the same time avoiding the common pitfalls of a natural law position. This makes his position a powerful alternative to positivism. Nonetheless, I argue, Greenberg's denial of special status to social facts in determining the content of law results in a conception of law that is deeply unintuitive. This, I suggest, results from his insistence on the impossibility of social facts to alone determine law. I thus conclude that it must be possible for social facts to, at the very least, determine what count as the relevant law practices of the community, independent of the relevant value facts. This is so even if there is no automatic or mechanical way of deriving legal content from them. Let us begin, then, with an overview of Greenberg's objection to positivism.

I. GREENBERG'S ATTACK ON POSITIVISM

Greenberg argues that social facts, or "law practices," cannot on their own determine the content of law. Law practices are ordinary things that people say and do (and think, hope, intend, etc.) that are capable of bearing on the content of the law.[8] These include legislative votes, judicial decisions, executive orders, administrative holdings, and all other social facts that are canonically taken to determine the law. It is true that these social facts are themselves creatures of law; what counts as a legislative vote, judicial decision, executive order, and so on itself depends on the law of the community. When Greenberg describes legislative votes, judicial decisions, and other legal content–laden social facts as law practices, he means to refer to those underlying non-legal content–laden social facts by virtue of which these legal content–laden ones hold.[9] Law practices, then, are those underlying non-legal content–laden social facts and practices that are capable of determining the content of law.

Law practices include *all* those social facts and practices that are capable of determining the content of law. Greenberg leaves open the nature or types of social facts or events that can bear on law. In part, this is precisely what is in question for him.[10] In addition to legislative votes, judicial decisions,

and so on, law practices thus also include legislative debates, the intentions of legislators, law practices in other countries, people's moral beliefs, etc., to the extent that these facts may also bear on law. To be sure, these latter practices are not normally considered to be canonical examples of law practices, so far as they are not normally thought to be legally authoritative practices. But, as Greenberg illustrates,[11] these social facts or practices can also have significant impact on the content of law. Any social fact capable of bearing on the content of law thus counts as a law practice, for Greenberg. The question, then, is what determines which are the relevant law practices of a community and the precise ways in which they determine the content of law.

Legal content consists in all those propositions of law (i.e., all legal standards and requirements) that are true in a given system.[12] In the U.S., the content of law would include propositions like, e.g., the standard that all contracts in restraint of trade are illegal; that the speed limit on highways is 60 mph; that persons shall not be deprived of life, liberty, or property without due process of law; and all other legal propositions that are true in the community. A legal proposition is true in a given system if it is a true statement of the law of that system. The law of a community thus consists in all of those legal propositions that are true in that community.

Law practices determine the content of law *rationally*; they make it the case that the law has a given content in a way that is rationally intelligible. There are a number of important points to notice about this relation. First, it is a metaphysical relation specifying the constitutive determinants of law; it is not an epistemological relation describing how people discern the content of law. Law (or legal content) is not metaphysically or ontologically basic; its existence depends on the existence of more metaphysically basic facts. Law practices are among those more (metaphysically) basic facts in virtue of which there are legal content facts. It is in this respect that they determine the content of law. Secondly, Greenberg notes, it is a distinctive feature of this relation that it is not arbitrary or brute. There must be reasons why law practices make the contribution to legal content that they do. This is not to say that the resulting legal content is always justified, or that where it is, law practices provide its justification. Neither claim is true. More generally, Greenberg is not supposing that the reasons explaining why law practices make the contributions that they do are necessarily normative. So holding would beg the question against positivism. Instead, Greenberg is making the relatively uncontroversial (as between non-positivists and positivists) assumption that law practices determine legal content in a way that is rationally intelligible; the contribution that they make to law should be rationally transparent to an intelligent creature. He *concludes* that so doing requires normative, or value, facts in addition to social ones. Greenberg calls this the *rational relations doctrine* or *rational determination*.

The problem for legal positivism arises because the content of law is often different from the ordinary content of things people say and do that can bear on the law. Words can have technical meanings at law that differ from their

ordinary non-legal meanings; the meaning of a provision can depend on its interpretation over time (consider, e.g., judicial interpretations of the Due Process Clause of the Constitution, or the Sherman Act); it can depend on its relation to other provisions of the statute, or other statutes or areas of law in which similarities arise. The contribution that a given decision makes to the law is not always the one announced in the judgment, a determination of the law resulting from a multiply split judgment can often require complex reasoning,[13] the legal proposition that results from a line of cases is not the mere conjunction of the propositions in each case,[14] conflicts between legal propositions are not typically resolved by appeal to their underlying non-legal propositions,[15] and so on. As Greenberg argues, there is no "mechanical" or "automatic" way to derive the content of law from its non-legal content.[16]

Moreover, in addition to the texts of statutes and judicial holdings, there are many other sentences and attitudes that are spoken or held by legal officials that pertain to law in many different contexts. These can include the preambles of statutes, presidential speeches at bill-signing ceremonies, legislative debates, *obiter dicta*, etc. They might also include the actual but unexpressed hopes or intentions of the members of the legislature as to how the courts will interpret a statute, private conversations or letters by officials expressing their intentions with respect to the law, officials' diaries, and so on. These all contribute, or don't contribute, to law in various complex ways.[17]

There must therefore be some fact or standard that determines which are the relevant social facts or practices that contribute to the law of the community (i.e., the relevant law practices of the community), and the precise way in which they do so. The problem for positivists is that social facts cannot supply such a standard. This is because, roughly speaking, no collection of social (or "descriptive," as Greenberg calls them) facts, taken on their own, can rule out arbitrary or "bent" interpretations. Consider Greenberg's example of *Roe v. Wade*.[18] There, the majority of the Supreme Court held that the right to privacy includes the right to abortion. But, Greenberg argues, there is nothing in the decision itself that rules out interpreting it as holding that women born on odd-numbered days have a right to obtain an abortion, but not otherwise, or, say, interpreting it as holding that all women have a right to obtain an abortion until a certain date, but that this right only applies to women born on odd-numbered days afterwards.[19] It is always possible that the practices support interpreting the judgment one way until a certain point, and then some other, arbitrary way ever afterwards. No particular law practice can determine the contribution that social facts make to the content of law. This is because something must determine that the contribution that it purports to make is the correct one.[20] And, no collection of social practices can, on their own, rule out arbitrary or "bent" interpretations. No matter how many social facts or practices one adds to the mix, one can always find some interpretation that they support, but is otherwise arbitrary. Greenberg thus concludes that *any* legal proposition, or proposed legal content, can be made consistent with a given set of social facts.[21]

Greenberg thus concludes that value facts are needed in order to determine the precise contribution that social facts make to law.[22] Value facts are facts that are independent of law practices that specify how law practices *should* contribute to law.[23] These can include considerations of fairness, democracy, welfare, stability, and other values that should determine the precise ways in which law practices should contribute to law.[24] So, for example, the facts (if they are facts) that democracy supports deferring to the legislators' intentions when interpreting statutes, or that fairness requires that judges adhere to precedent even when past decisions are morally imperfect, are potential value facts that can determine the contribution that law practices make to law.[25] The inclusion of such facts as among the determinants of law would solve the problem raised above, namely, that an arbitrary number of (arbitrary) legal propositions can be derived from the relevant law practices alone. Moreover, value facts are relevant to legal content "without further reasons";[26] their relevance or rational intelligibility to the determination of legal content is immanent. The question of what determines the relevance of these facts thus does not arise for value facts.[27] Value facts are therefore "just the sort of fact" that could supplement law practices and explain in rational terms their contribution to the resulting legal content.[28]

Greenberg thus rejects positivism's insistence on an ultimate social standard determining what counts as the relevant law practices of a community, and providing an independent specification of how they contribute to law. Instead, Greenberg insists, the ultimate standard determining what count as the relevant law practices of the community and the precise way in which they contribute to law must itself be a question of the relevant value facts. True, the relevant value facts are themselves dependent on the totality of circumstances of the community; law is not simply a matter of what's best for the community *ex ante*, or independent of the community's practices. But, as Greenberg goes to significant lengths to argue, there is no further *legal* fact of what constitute the relevant law practices of the community and the precise way in which they contribute to law beyond what the relevant value facts specify; the contribution that the relevant law practices make to the law of the community is whatever the relevant value facts dictate. Value facts determine "what counts as a law practice; which aspects of law practices are relevant to the content of the law; and how different relevant aspects combine to determine the content of the law, including how conflicts between relevant aspects are resolved." [29]

II. GREENBERG'S ALTERNATIVE ACCOUNT

In the alternative, Greenberg argues that the bearing that law practices have on law[30] is that which is "most X-justified after taking into account practices in the way that it is most X-justified to take them into account,"[31] where X is the most valuable way that practices can bear on law, all things considered

as determined independently of the practices of a given community.[32] In other words, law practices bear on law in the way that they most ought to given the practices of the community, including its past law practices, and for some value determined independently of the particular practices of a given community. So, e.g., if the most valuable way that a given community's practices can bear on law is to promote the community's wealth (or its security, fairness, etc.), then the law of that community will be that which best promotes the community's wealth (or security, fairness, etc.), given the totality of the community's practices, including its law practices. The independence condition ensures that the relevant value facts are not simply those that the members of the community happen to hold at a given time; they are those that ought actually to hold, given the circumstances of the community. And Greenberg avoids the mistakes of a naive natural law position by ensuring that value facts determine the contribution of law practices *ex post*, or taking the totality of the circumstances of the community, including its law practices, into account. This guarantees that the law of a community is not whatever it ought to be, nor is it necessarily whatever the morally best legal system for that community, independent of the community's law practices.[33] Rather, the law of a community is that which it ought to be given the law practices of the community, and the precise way that they ought to contribute to that community's law in the totality of the circumstances of the community.

Greenberg elaborates on this in his later work. In "The Standard Picture and Its Discontents," Greenberg defends what he calls the *Dependence View* of law.[34] On the Dependence View, the law consists in that part of the moral profile of a community that has come to obtain in certain characteristic ways. The *moral profile* of a community consists in the collection of "all of the moral obligations, powers, permissions, privileges, and so on that obtain in that society."[35] It consists in what morality actually requires at a given time in a society, given the circumstances of that society combined with general moral truths. It can thus vary from society to society, or from time to time within a society, as circumstances change.[36] The law of a community is then that aspect of the moral profile that was created in characteristically legal ways.

The moral profile of a community can include requirements that are not *ex ante* moral norms. For example, it can require particular solutions to coordination problems, in light of the circumstances of the community (when, say, a convention has been established or the legislature has pronounced a solution, etc.). It can do so even though there is no antecedent moral norm governing the outcome.[37] Alternately, Greenberg notes, it can require people to participate in a morally flawed scheme for achieving an important goal, if others are doing so or are likely to do so.[38] Considerations of fairness and democracy can also require people to do things that are not antecedently morally required, or are otherwise morally imperfect. To take Greenberg's example, fairness might require adhering to a settled method for dividing up

stakes in a card game, even if the method is not fairest *ex ante* one.[39] So too with the moral profile of a community: considerations of fairness or democracy can require people to adhere to decisions or pronouncements by legal officials, even if they are *ex ante* morally imperfect. And so on.

Law, then, for Greenberg, consists in those aspects of a moral profile that come about in those ways that people ordinarily associate with law. It is those *ex post* moral obligations that are "the result of actions of legal institutions, such as the enactment of legislation and the adjudication of cases,"[40] though it is not limited to these.[41] These moral obligations, permissions, etc., have legal force in the community (and they form the content of the law of the community) to the extent that morality dictates that they constitute its law, given the circumstances of the community.

So, for example, if a legislature specifies a particular solution to a coordination problem, this makes the solution more salient than the others. Since, in such circumstances, people have moral reason to follow the solution that most people follow, the legislature's pronouncement changes the moral profile of the community, thereby creating a new moral obligation. This new moral obligation counts as a legal obligation because it was created in one of the characteristic ways. But, it is a legal obligation *because* it created a moral obligation in the circumstances, and not *vice versa*. As Greenberg explains, "on this picture, the specified solution is a legal obligation *not* merely because legislature pronounced it but roughly because the legislature's pronouncing it had the effect of making it more salient than other solutions, thereby changing people's moral obligations."[42]

Greenberg thus successfully avoids the error of collapsing law into morality, or claiming that the posited law of a community is not law unless it accords with morality (considered *ex ante*), while at the same time taking the practices of the community into account and preserving the positivist intuition that the existence and content of law depends on the practices of the community. In all these respects, his account is enormously powerful.

Greenberg's view is thus, although not a pragmatist approach to law, pragmatist-*ish*. He argues that, first, what count as the relevant social facts, or law-determining practices, is a function of value facts. Value facts thus have priority over social ones in determining how social facts contribute to law. Secondly, which are the relevant social facts, and the precise way in which they contribute to law is *whatever* the relevant value facts dictate. There is no further social fact constraining what count as the relevant law practices of the community beyond those that are so dictated by the relevant value facts. Finally, for Greenberg, the ultimate question of how the relevant value facts determine what count as the law practices of the community, and the contribution that law practices make to law is one of value, not social, fact. There is nothing more to the law of a community that what the relevant value facts so specify, given its law practices, and their significance in the totality of the circumstances. Greenberg's argument is distinctly metaphysical; it does not rely on the nature of law or legal reasoning, as do many

pragmatist arguments about law. Nonetheless, his conclusions resemble the contextualist and antifoundationalist positions that often characterize pragmatist approaches to law. These aspects of Greenberg's view, I suggest, though not quite pragmatist, make it a pragmatic-*ish* view of law.

Must positivists accept that value facts are needed in order for social facts to determine the posited law of a community? This depends on how we construe Greenberg's argument, and the precise nature of the value (or normative) facts that are needed in order to specify the significance of law practices to the content of law. Even if Greenberg is correct to hold that value facts are needed in order to rule out arbitrary or "bent" propositions of law, the inclusion of such minimally normative considerations poses no threat to positivism. It is implausible to construe positivism's denial of a moral test for determining the content of law as excluding mere common-sensical considerations ruling out absurd consequences. Nor ought the inclusion of such value facts in law amount to the inclusion of morality in law in any way that should satisfy antipositivists. Antipositivists' insistence on the moral nature of law rings hollow when understood as nothing more than the exclusion of arbitrary and nonsensical rules. Claiming this as a victory for antipositivists trivializes both sides of the debate.

Greenberg's insistence on the inclusion of value (or normative) facts in the law is better understood as the more substantive requirement that *moral* considerations (or facts) be among the determinants of law. This understanding of his conclusion better fits with his own explanation of the value facts that are relevant to law, and it is consistent with his "catholic" view of morality as including serious prudential or other kinds of obligations.[43] Most importantly, this understanding of the relevant kind of value facts best underscores his disagreement with positivism; this conclusion is indeed one that positivists would reject. This is so even if it does not necessarily fit comfortably with his initial formulation of the objection to positivism. I will thus proceed on the assumption that the relevant value facts that Greenberg thinks are needed for law are moral ones, broadly construed, but of the kind that positivists would reject.

There is a deeper problem with Greenberg's insistence on the priority of moral considerations, or value facts, over social ones in the determination of legal content. The problem, I will argue, is that, unless certain social facts have independent legal weight—that is, unless certain things that people say and do determine the law of the community independently of the relevant value facts or *ex post* moral circumstances of the community—the resulting moral profile of the community—those rights, obligations, permissions, etc., that hold in the community in light of the relevant social facts—will be unlike anything we currently recognize as law. In other words, I will argue, unless we take with positivists certain social facts to carry independent legal weight or to be capable of determining the contribution that they make to law independently of value facts that might hold in the circumstances, the resulting rights, obligations, etc., that hold in a community in light of its

social circumstances will bear little resemblance to anything we might call law. Specifically, they will have none of the unity or stability that we typically attribute to law. The basic reason for this is that the relevant value facts change as the circumstances of the community change, and as these evolve, so too will what count as the relevant law practices of the community. This will result, I will argue, in either an ever-changing legal system whose past law changes as the circumstances of the community change, or one that remains static throughout changes in the community, but whose past law practices have little moral bearing on the current ones, or on one another. Let us consider this objection in more detail.

III. OBJECTION TO GREENBERG'S VIEW

Recall Greenberg's example of *Roe v. Wade*. There, after rehearsing its arguments, the majority of the Supreme Court pronounced, "[W]e therefore conclude that the right to personal privacy includes the abortion decision."[44] According to Greenberg, the majority's pronouncement that the right to privacy includes the right to abortion confers on women a legal right to abortion because, in the totality of circumstances, it ought to. This seems like an odd thing to say. Why would the fact that seven people in robes announced that they think that the right to privacy includes a right to abortion be so morally significant so as to *confer* on women a constitutional right to abortion?

The answer can't lie merely in making the option more salient; it is implausible to think that an announcement by seven people on the legal right to abortion has significant effect on the salience of this option for anyone. More importantly, it is even less plausible to suppose that mere salience is likely to hold sway on a question as morally vexed as abortion. Salience can be morally significant when the choice between options is morally arbitrary, and all that is needed is a tie-breaker to give people reason to prefer one alternative over another. This is not so on questions of abortion. The relevant moral considerations (rights of women over their bodies, the moral status of a fetus, the bearing of its status on the moral significance of its destruction, the rights of the father in deciding the question, the interests of the community in its members' health and their [potential] rights to life, derivative questions of race and class that arise from these questions, and so on) are so weighty and complex that it is hard to imagine that mere salience has sufficient weight to affect anyone's judgment on the issue. The same holds for considerations of fairness and democracy, or other reasons that people might have for upholding a norm that, though best in the circumstances, is not morally right *ex ante*. It is unlikely that these considerations can hold sufficient sway in the circumstances so as to lend *moral* reason to accord legal significance to this pronouncement.[45]

One might object that I have mischaracterized Greenberg's argument. The majority members of the Supreme Court judgment are not just *any*

seven members of the community; they are the majority of the members of the highest court in the land. And their announcement that they hold that the right to privacy includes a right to abortion is not just idle pontification on a vexed question (and their robes not mere costume); it is the holding of a judgment on a case that was duly put before them, and upon which they were called to rule. By ignoring these key features of the circumstances, one might argue, I am ignoring the relevant social facts that make such a pronouncement so weighty.

To an extent, this is of course true. It is because the members of the community take pronouncements by the majority of the Supreme Court to be law, because the current pronouncement was made in the course of deciding *Roe v. Wade*, a case that was duly appealed from a federal district court in Texas, because the Ninth and Fourteenth Amendments have been interpreted to include a right to privacy in the past, these provisions are part of the Constitution, which is taken to be the supreme law of the land, and so on, that when the majority of the Court so pronounces, women thereby have this right, and the Texas statute is nullified. These social facts are all part of the relevant law practices of the community that are such as to lend moral, and hence legal, significance to the majority's pronouncement.

But why are *these* social facts significant in the circumstances? Why are they so significant so as to lend moral, and hence legal, weight to the majority's current pronouncement? The moral significance of these acts and utterances cannot derive from their legal significance in the circumstances, because this is precisely what Greenberg denies. Why, then, of all the official acts and utterances in the history of the community, and all those social practices that are capable of bearing on the moral status of women's legal right to abortion in the community, do *these* accord moral, and hence legal, significance to the majority's current pronouncement?

At first glance, the answer might seem obvious: these are the relevant law practices of the community, and they are for this reason morally significant in the circumstances. This line of thought has some initial plausibility, since the law practices of a community surely have special moral weight in the community, and, I believe, Greenberg must have something like this line of thought in mind in advancing his argument. However, even if we could identify the relevant law practices of the community,[46] so far as the moral significance of these social practices is evaluated prior to, or independently of, their legal significance, it is either variable in a way that is antithetical to how we normally think of law, or else it is arbitrary. And, I suggest, this problem arises precisely because Greenberg insists that the legal significance of certain social facts in the circumstances is determined by appeal to their moral significance in the circumstances. The basic problem for this line of argument arises from the variable significance of law and its underlying law practices in changing circumstances.

Circumstances change. As the values and circumstances of a community shift, so too does the significance or insignificance of its past practices,

including its law practices. Law practices that people once thought to be just can later be considered unjust; decisions or enactments once thought to be insignificant can turn out to be of great importance as circumstances change and new issues arise, and those once thought to carry great weight might turn out to be of little significance, or their significance might fade or diminish with time. The values that a given community places on its legal system or that it takes its legal system to promote can change as the values of the community change over time, or they might become important for different reasons, as the circumstances and values (and members) of the community change.[47] And so on. When determining the legal significance of a given act or pronouncement in light of the totality of the circumstances—that is, when determining the legal significance of a given *law practice* in the totality of the circumstances, including the moral significance of past law practices in the circumstances—one must therefore ask: which practices is the community to weigh in the circumstances? And in which circumstances is their significance to be evaluated? The current ones? Or the ones in which they occurred?

If the moral significance of past law practices is to be measured in the *current* circumstances, then the moral significance of all past law practices—i.e., all those past sayings and doings that are capable of bearing on the current law on a matter—is to be reevaluated every time someone says or does something new that might be of legal significance. That is, if the moral significance of past law practices is to be determined with respect to their moral significance in the current circumstances, then the moral significance of all past law practice must be reevaluated in the new circumstances every time there is a new law practice, in light of the community's changed circumstances and values.

The problem is not that a court now might have no (or little) reason to uphold a decision of past courts or earlier legislative enactments. This would make it the ordinary problem of attempting to justify the doctrine of *stare decisis* or explaining why courts should be bound by past legislation. Nor is the problem that rules and decisions are often reimagined and reinterpreted as new circumstances arise, so that the law can bend and adapt to changing times. These are difficult problems, but neither challenges the very possibility that social facts can determine the posited law. The problem Greenberg faces is much deeper than these. For Greenberg, as the circumstances and values of a community evolve, *what counts as the community's law and its legal history* changes, as past practices are reevaluated in light of changing circumstances and values. As the values of a community change, so do its reasons for taking some law practices to be legally significant in the circumstances and others not. This results in an ever-changing legal terrain whose *past* law shifts as the community's circumstances and values shift.

On the other hand, perhaps the legal significance of law practices is to be evaluated in the circumstances of their occurrence, and then forever fixed. On this understanding of law, the legal significance of past practices is determined by their moral significance at the time of their occurrence, and

then persists thereafter. So, e.g., when deciding whether the right to privacy includes a right to abortion, the *Roe* Court would consider the significance of the Ninth and Fourteenth Amendments at the time of their enactments, given the community's values at the time. It would look to their later interpretations to include a right of privacy at the time that these decisions were made, given the community's evolved values; each subsequent decision would be evaluated in light of its significance in the circumstances at the time, given the community's values then, and so on. This would solve the problem of ever-changing past law. This is because, on this approach, there would be no need to reevaluate the moral significance of past law practices in light of changed circumstances in order to determine their legal significance; the moral (and hence legal) significance of a given law practice at the time of its occurrence carries over into the current circumstances. But then what bearing would these past practices and decisions have on the present one and on each other? What conclusion could the Court now draw on the basis of past law? Most importantly, what reason would the community now have to take past practices as morally significant? Law, on this view, is just a record of those past acts and utterances that past members of the community took to be morally significant in the circumstances, given its values at the time. This *staccato* view of law is so stilted and fractured that it shatters any notion of a unified system whose underlying values are expressed in law and can be uncovered so as to drive the system forward.

As mentioned in the introduction, in addition to normally generating all things considered obligations, law also consists in a coherent system of rules or propositions that persists over time, and can withstand changes in the moral circumstances of the community, and its moral significance in these circumstances. It is precisely this feature of law that can warrant judges and lawmakers to look to other aspects of law, including past practices, when making new law, either by deciding a case or through legislation. This is not to say that absent this notion of law, legal officials would have no reason to consider systemic considerations (like past legal decisions, other aspects of the system, etc.) when making new law or issuing a decision. Nor is it to say that legal officials are always justified in appealing to systemic considerations when making new decisions about law; past law or other aspects of the legal system may offer no justification at all for a given outcome. But, I suggest, the systemic nature of law is what gives special weight to legal considerations, as opposed to all other types of considerations that a legal official might look to when making decisions about law. And, as I have argued, by making the content of law depend on its moral significance in the circumstances, Greenberg obscures this familiar feature of law.

This might seem like a strange line of argument to advance in defense of legal positivism. After all, the idea that the posited law (or, at least, the posited secondary rules) of a community is determined by its social practices lies at the heart of legal positivism. Greenberg might thus respond that, by positivists' own lights, the relevant law practices of the community are just

those that are supported by the community's practices, and that the community *takes* to be its past law and legal institutions. Surely, in objecting to his view, positivists cannot take issue with *this* premise!

It is here that the core of the dispute between positivism and Greenberg's position is sharpest. It is true that, for positivists, the law of a community is determined by the relevant practices of the community and the members of the community taking certain acts and pronouncements to be legally authoritative.[48] In advancing his objection to positivism, it might seem that Greenberg is conceding this aspect of law. He is simply providing an account of what can make such an intuitive idea true, and showing that, if true, it is inconsistent with positivism.

However, unlike for legal positivists, this idea is available to Greenberg only on pain of begging the question. For positivists, the fact that members of the community take certain acts and utterances to be legally authoritative *makes* them so; all further pronouncements issued by such authorities constitute the law of the community. Not so for Greenberg. For Greenberg, it is the moral significance of the fact that, at different times, various members of the community have taken various acts and utterances in various circumstances to be legally authoritative that makes them so. But, as we have seen, either what count as the relevant past acts and practices changes, as the moral circumstances of the community change, or else they are morally arbitrary. Absent appeal to the independent status of law practices as law, Greenberg cannot explain why past practices by past members of the community of taking past acts and utterances to be legally authoritative in the past is morally significant now.

This problem generalizes. On neither approach is there reason to think that the law of a community would be that which results from legislative enactments and authoritative pronouncements (e.g., judicial and administrative decisions, etc.) or that the sources of law would bear much resemblance to those we standardly think of as authoritative. As Greenberg takes pains to note, standard distinctions between law-creating acts and all other official acts and pronouncements are arbitrary and misleading; official acts and pronouncements (and law practices generally) can affect law in indefinitely many ways, and, Greenberg argues, there is no antecedent way of distinguishing those that determine law and those that do not (and the precise ways in which they do). As we saw above, Greenberg explicitly rejects the idea that there is a sharp distinction between those law practices that determine the content of law, and all others. Any official act or pronouncement (or law practice) and any other law practice in the community that is "characteristic" of law can affect the law of the community, if, in the circumstances, morality so dictates. His conception of law is thus revisionary in this respect.

Note also that, on this approach, what counts as the relevant community, and which practices are relevant (including the history of past practices) also depends on the circumstances. On standard conceptions of law, jurisdiction

is determined by the system: the boundaries between communities and their members, and the relation that different systems bear to one another are questions of law. If, as Greenberg supposes, these too depend on the moral circumstances of the community, then there is no antecedent way of delineating the relevant circumstances (and the relevant community) upon which law practices are supposed to bear. Any law practice can thus have bearing on any system if morality so dictates. There is thus no sharp distinction between legal systems, and the laws of a community either, for Greenberg.

IV. CONCLUSION

Greenberg thus secures law's metaphysical foundations at the expense of preserving law's unity throughout changing circumstances. Is there a way out of this dilemma? Even if Greenberg is right to hold that moral considerations are needed in order to determine the contribution that social facts make to law, they need not be of the kind that are objectionable to positivists. If all that are needed are normative considerations like "democracy supports deferring to the legislators' intentions when interpreting statutes," or "fairness requires that judges adhere to precedent even when past decisions are morally imperfect," and so on in order to determine the contributions that law practices make to law, given the totality of circumstances, then these hardly qualify as a moral test for the content of law in a way that positivists would find objectionable. Recall Hart's reply to Fuller. There he argued that even an odious legal system could satisfy some minimal moral requirements.[49] Even if Greenberg is right to suggest that social facts do not determine the content of law "automatically" or "mechanically," positivists may well still accept this conclusion while preserving these other core features of law.

NOTES

* I thank Arthur Ripstein and Barbara Baum Levenbrook for comments on earlier drafts of this paper.

1. See M. Greenberg, "How Facts Make Law," and "Hartian Positivism and Normative Facts: How Facts Make Law II," both in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin*, S. Hershovitz ed. (Oxford UP, 2005), 225–64 and 265–90 (hereinafter *HFML I* and *HFML II*); and "The Standard Picture and Its Discontents," *Oxford Studies in Philosophy of Law*, vol. 1, L. Green and B. Leiter eds. (Oxford UP, 2011), 39–106. Many of the themes articulated in these writings are also developed in other works. See "On Practices and the Law," *Legal Theory* 12 (2006), 113–36, reprinted in "Law: Metaphysics Meaning and Objectivity," *Social, Political, and Legal Philosophy* 2 (2007), 95; and "Reasons without Values," *Social Political and Legal Philosophy* 2 (2007), 133. Because *HFML I* contains the clearest and most complete defense of Greenberg's position (and because his subsequent

defenses regularly refer to it), I take the argument presented there as my primary target. I address other of Greenberg's essays when they affect my argument.

2. The terminology Greenberg uses to describe these different types of facts has shifted slightly as he has elaborated his views. "Law practices" are what positivists typically call "social facts"; that is, non-normative contingent facts about people's psychologies and behavior that can bear on law. They are a subset of what Greenberg calls "descriptive facts," or non-normative contingent facts generally. "Value facts" are true normative propositions about what is good or bad, fair or unfair, right or wrong, etc. Greenberg later refers to these as "normative facts." I use his original terminology, except where noted. For an explanation of his updated terminology, see Greenberg, "On Practices and the Law," 113, and *HFML II*, sec. I.
3. Legal pragmatism is, of course, a broad and eclectic doctrine. I do not aim to provide an analysis or a precise characterization of this position, nor am I trying to prove that Greenberg is really a pragmatist about law. I mean only to highlight some resemblances between Greenberg's position—both the negative aspect of his objection to positivism and his positive account—and some of the basic features of legal pragmatism. In particular, I suggest, Greenberg's insistence on the normative nature of law shares pragmatists' contextualism and antifoundationalism about law. See sec. II below for a more detailed discussion of this conclusion.
4. Greenberg develops this idea in "The Standard Picture," 56f.
5. Greenberg explains: "the relevant part of the moral profile is that which has come to obtain in certain characteristic ways, typically as the result of actions of legal institutions such as the enactment of legislation and the adjudication of cases" ("The Standard Picture," 57).
6. Specifically, Greenberg argues that the contribution that law practices make to the content of law depends on that specified by the relevant value facts, where the relevant value facts are those that bear on the matter, taking the circumstances of the community into account.
7. See R. Dworkin, *Taking Rights Seriously* (Harvard UP, 1978); and *Law's Empire* (Harvard UP, 1986).
8. See *HFML I*, 231f., 234f.
9. As Greenberg notes, to the extent that normative or value facts are needed in order to determine these legal content–laden facts, so much the worse for positivism (*ibid*., 235).
10. More precisely, which facts determine which law practices are relevant to law, and the precise ways in which they bear on it (and whether these further facts are themselves social or value facts) is what is in question for Greenberg. For his discussion of the open-ended nature of law practices, see *ibid*., 235.
11. See *ibid*., 241f.
12. *Ibid*., 230. Greenberg borrows this term from Dworkin, *Law's Empire*, 4. Note that his later works refer to legal content as "legal facts." See Greenberg, "On Practices and the Law."
13. *HFML I*, 243. See generally *HFML I*, 240–45, for Greenberg's full discussion of this problem.
14. *Ibid*., 245.
15. *Ibid*., 243.
16. Greenberg makes this point often in his argument. See, e.g., *ibid*., 241, 243, 244.
17. These considerations all go to what Greenberg calls the "real problem" of legal content (*ibid*., 244).

18. 410 U.S. 113 (1973).
19. This is because it is always possible that, e.g., standard practices of interpretation are effective until a certain date, and "bent" or "checkerboard" afterwards (*HFML I*, 249f).
20. *Ibid*., 247.
21. See *ibid*., 248 ("For any legal proposition, there will always be a model supported by the practices that yields that proposition").
22. Greenberg also considers and rejects the possibility that beliefs about value facts, non-normative conceptual truths can determine the content of law. I will set aside these arguments as the main focus of my argument is with his conclusion about the relevance of value facts to the determination of legal content. See *ibid*., secs. V and VI.
23. Greenberg puts this point in terms of specifying the legally correct model for mapping law practices onto the content of law. Models are the metaphysical equivalent of theories of interpretation. Greenberg concludes that value facts are needed to determine the legally correct model for mapping law practices onto legal content. See *ibid*., sec. IV.
24. *Ibid*., 256.
25. See *ibid*., 254–64; and *HFML II*, 284ff.
26. *HFML I*, 254.
27. Greenberg makes this point in *HFML II* and "Reasons without Values."
28. *HFML II*, 276.
29. *Ibid*., 246. See also *ibid*., 236 (arguing that law practices are those non-legal–content descriptive facts that "turn out to" play a role in determining the content of law).
30. As Greenberg puts it, the "what bearing practices have on the legally correct model" (*HFML I*, 258).
31. *Ibid*.
32. So, e.g., *X* might be the promotion of wealth maximization, the maintenance of the status quo, security, fairness, morality, etc. Or it can be some special legal value that is internal to the concept of law (*ibid.,* 257f).
33. *Ibid*., 259.
34. See "The Standard Picture," 55ff.
35. *Ibid*., 56.
36. Though, as Greenberg notes, it is not relativistic (*ibid*., 57). Note that given the open-endedness of Greenberg's understanding of law practices, and the priority he places on the moral, the constraint that law practices are those social acts that obtain in "characteristic ways" is quite weak. This is especially so given that, as we know from Hart, what counts as an official act is itself a matter of the posited law.
37. So, for example, it can require people to drive on the right side of the road when everyone else does so even though there is no *ex ante* moral obligation to do so (*ibid*., 57).
38. *Ibid*., 58.
39. *Ibid*.
40. *Ibid*., 57.
41. *Ibid*.
42. *Ibid*.
43. See *ibid*., 81ff, for Greenberg's discussion of this understanding of morality.
44. 410 U.S. at 154.
45. I am not suggesting that Greenberg thinks that reasons of salience, or fairness and democracy, are the only reasons a community might have for according legal status to an authoritative pronouncement. Those are only examples of the ways an authoritative act, pronouncement, or law practice generally can

have a moral impact on the circumstances of a community. My point is that, at least in morally vexed issues like abortion that the law might weigh in on, it is hard to see how, absent an appeal to its status as law, the mere *fact of* pronouncement can be so morally weighty so as to alter the *legal* rights that people have.

46. I will raise doubts about this below.
47. This of course assumes it makes sense to speak of "the community's values" in the first place.
48. This is a deceptively simple claim. The precise ways in which members of the community must "take" its law to be the law of the community, and by which practices are deemed legally authoritative is widely debated among positivists and non-positivists. I hope to sidestep these difficult questions and make my description of positivism as non-controversial as possible.
49. H.L.A. Hart, "Positivism and the Separation between Law and Morals," *Harvard Law Review,* 71 (1958), 593–629, 624.