How to see law as morality: a suggestion
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Introduction

Perspective matters in philosophy. It matters enough that we can sometimes hope to make progress just by looking at old issues in new ways. The hope is that we might see familiar facts and controversies differently, and understand them better for it. In recent work, some prominent legal philosophers—including Ronald Dworkin, Mark Greenberg, and Scott Hershovitz—make the case for hope in jurisprudence: they think we can see the issues differently, and understand them better for it. They don’t see things in exactly the same way, of course, but they effectively agree that we should see law as morality. In other words, they agree that we should understand legal rights and obligations (i.e., legal facts) as certain moral rights and obligations (i.e., moral facts) triggered by the actions of legal and political institutions.

I will explain this perspective in more detail below, and review some reasons to think it’s more plausible than it first seems. But for now just note one challenge to seeing law this way, which I will focus on in this paper. The challenge, in short, is to make sense of the

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2 Let me make two quick comments now, simply to avoid any misunderstandings. First: I follow Dworkin, Greenberg, and Hershovitz and use “moral” in an inclusive sense. Moral facts so understood include genuine rights, responsibilities, powers, and reasons of all sorts (e.g., those we have in virtue of our promises or friendships), and not merely those we have in virtue of (e.g.) being persons. This choice doesn’t change the substance of their views, but it might make them seem stranger to people who reserve “moral” for a proper subset of our genuine rights, responsibilities, powers, and reasons. Second: like Greenberg, I use “fact” in a lightweight sense, so that moral facts are just true claims (or the propositions expressed by true claims) about our rights, responsibilities, powers, and reasons. Mark Greenberg, How Facts Make Law, in Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin 225, 234 n.22 (Scott Hershovitz ed., 2006). See, e.g., Allan Gibbard, Thinking How To Live 182 (2003) for more on facts in this sense. Finally, see, e.g., David Enoch, Reason-Giving and the Law, in Oxford Studies in Philosophy of Law (Leslie Green & Brian Leiter eds., 2011) for more about the idea that descriptive facts “trigger” moral facts.
distinction we ordinarily draw between legal facts and moral facts. After all, the actions of legal and political institutions affect countless moral facts, and it won’t do to regard them all as legal. The challenge is for the law-as-morality framework to sort them properly. Mark Greenberg attempts to answer the challenge by introducing conditions that distinguish legal rights and obligations from other moral rights and obligations. In effect, Greenberg characterizes a “legal domain” of morality that’s meant to fit and explain what we ordinarily think about legal facts. Greenberg’s approach to the challenge seems promising to me, but the specific conditions he defends do not. I will briefly explain why, but my primary aim is to outline an alternative way to characterize the legal domain of morality. My suggestion, roughly speaking, is that we should distinguish legal obligations from other moral obligations by the distinctive moral liabilities we incur for violating them.

**Law as morality: some basic ideas**

Let me start by saying a bit more about the idea that legal facts are best understood as moral facts. It sounds bizarre, but it’s not so difficult to understand how it might work, at least in outline. In some ways, it’s simply an application of the familiar idea that the reasons, rights, and obligations we have depend in part on our descriptive circumstances. For example, the crises we happen to live through affect the details of our obligations to provide aid; the goals our spouses set for themselves affect what we have reason to do to support them; and the promises that people make to us affect the details of our rights to make demands of them. The actions of legal and political institutions are no different in this respect, a point that even critics might concede. After all, legal and political institutions have the power to shape our circumstances, so of course their actions will have moral consequences. Take an uncontroversial example. The actions of legal and political institutions affect the traffic patterns, and traffic patterns affect our moral obligations. Given how traffic works around here, we have moral obligations not to accelerate through red

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3 This worry is an example of a general concern: that the law-as-morality framework doesn’t adequately fit and explain what we ordinarily think about our legal practices and the legal rights and obligations they generate. I will address some of these concerns along the way, but I will limit my discussion to the main question when possible: how to make sense of a difference between law and morality within the law-as-morality framework. I also won’t ask—as, e.g., Scott Shapiro, *Legality* 49–50, 188–92 (2011) insists we must—how the law-as-morality framework, once fully worked out, compares to its comprehensive alternatives. I attempt to say more about these issues elsewhere.
lights and not to tell children they are free to cross the street once they’ve checked for cars on their right. So we can understand the claim that the actions of legal and political institutions—which include legislative enactments, judicial rulings, executive actions, and much else—affect our moral rights and obligations. But we ordinarily think that the actions of legal and political institutions also—and perhaps primarily—affect our legal rights and obligations.\(^4\) We can ask, it seems, about both the moral and the legal consequences of the actions of legal and political institutions. Greenberg and other law-as-morality proponents simply argue that these questions aren’t so different. In their view, what we ordinarily regard as our legal rights and obligations are best understood as a subset of the moral rights and obligations triggered by the actions of legal and political institutions.\(^5\)

There might be advantages to seeing law this way, though I won’t try to discuss them all. But one possible advantage is the framework’s ability to explain what Dworkin and others call theoretical disagreement about the legal facts.\(^6\) Sometimes judges, lawyers, and other participants in the practice disagree about the legal facts, even after they’ve settled the historical record and the courts have spoken. In these cases, they disagree because they disagree about the legal significance of the historical record. The law-as-morality framework seems to provide a straightforward explanation. After all, the existence of certain moral facts is controversial, even after all the historical facts are in and we’ve (perhaps temporarily) resolved our dispute about what’s to be done. In these cases, we disagree because we disagree about the moral significance of the historical record. If, then, we understand legal facts as certain moral facts, and legal significance a certain kind of moral significance, it will be no surprise that people can and do disagree about the legal facts even when they agree

\(^4\) This is common sense; or at least it’s common ground in contemporary jurisprudence.

\(^5\) Here’s a parallel case that might illuminate the proposal. We regard ourselves as having familial obligations, and we ask how events affect them. But we don’t take these obligations to be so different from other genuine obligations. It seems right, in fact, to say that they are genuine obligations that we mark as familial to explain their source. In other words, it seems right to say that the distinction we draw between familial obligations and other genuine obligations is a distinction we draw within morality (in the inclusive sense used here). The law-as-morality framework recommends that we see legal obligations in the same way. See also Hershovitz supra note 1, at 38-40.

\(^6\) RONALD DWORKIN, LAW’S EMPIRE 4-6 (2006) and Shapiro, LEGALITY supra note 3 at 282-306.
about the historical record. There might also be disadvantages to seeing law as morality, but it’s worth stressing that doing so won’t have every disadvantage you might think. For example, the framework doesn’t imply that our legal rights and obligations are as they morally ought to be, or that they are otherwise beyond moral criticism. Nor does it imply that we could determine our legal rights and obligations without looking carefully at the legislative or judicial record.

I won’t pursue these issues further here, or the question of how the law-as-morality framework might transform our understanding of certain issues in jurisprudence. Instead I will focus on just one challenge to the law-as-morality framework. That challenge, recall, is how to explain the distinction we ordinarily draw between legal facts and moral facts.

Locating law within morality

Let’s start with an example that makes the challenge to the law-as-morality framework more vivid. Imagine your local legislature votes to implement a new traffic code, and instructs other agencies to post and enforce lower speed limits. These actions will trigger changes to the moral facts. But the moral upshots will be diverse: they might include an obligation to drive slower than you used to; but they might also include an obligation to leave the house earlier for appointments or, in the extreme, to find work closer to come (if,

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7 Doesn’t this explanation trade one problem for another? Most questions of legal rights and obligations have relatively uncontroversial answers. One worry might that Greenberg’s theory has trouble explaining this feature of the practice. It might. But it’s worth stressing that not all moral questions have controversial answers. This is especially true when it’s agreed that the answer to a moral question turns on uncontroversial facts about the historical record. I have lived places where chore wheels determine some of my moral responsibilities each week.

8 This is because we can make sense of the idea that we have moral obligations that aren’t as it would be best for them to be. Jeremy Waldron, interpreting Dworkin’s view, draws an analogy with regrettable promises: they often shape our responsibilities, and the results are not exactly what they morally ought to be. Jeremy Waldron, *Jurisprudence for Hedgehogs* (MS).

9 To know specific non-conditional moral facts, we need to know a lot about our descriptive circumstances.

10 For example, I think the Hart/Dworkin debate, about the ultimate grounds of legal rights and obligations, is transformed in an interesting way. The idea that legal rights and obligations are best understood as certain moral rights and obligations resolves the debate in the non-positivist’s favor, at least in one sense. But there is still a question about the grounds of our legal rights and obligations, and the degree to which they are fixed by social facts about the legal practice—except we should understand it as a moral question. And we might give positivist friendly answers to the moral question, since we might think that the state usually can’t legitimately hold people to any standards except those that are publicized in certain ways.
say, the longer commute interferes with important familial obligations). The basic law-as-morality framework holds that legal facts are moral facts triggered by the actions of legal and political institutions. So the basic framework seems to recommend that we regard all these obligations as legal obligations. That won’t do. The challenge is to modify the basic framework so its account of the “legal domain” of morality adequately fits and explains what we ordinarily think about legal facts.

A. Greenberg’s conditions

Greenberg starts with the basic law-as-morality framework. He writes: “the legal obligations are those moral obligations created by the actions of legal institutions.” But Greenberg adds two conditions to this basic framework.

First, Greenberg proposes to distinguish legal facts by their moral force: he suggests that moral facts are legal facts only if they are all-things-considered moral facts. Call this Greenberg’s force condition. He uses legal obligation to explain the point: “The relevant obligations—the ones that, according to my theory, are legal obligations—are simply genuine, all-things-considered, practical obligations created by the actions of legal institutions.” On Greenberg’s view, “an all-things-considered obligation is one that, taking all relevant considerations into account, one should fulfill.” The upshot is that moral obligations are

\[\text{\footnotesize Note that Hershovitz rejects this interpretation of the challenge. He recognizes that we ordinarily distinguish legal facts from moral facts, and he accepts a burden to explain these distinctions within the law-as-morality framework. But Hershovitz declines to explain them by characterizing a legal domain of morality. Instead argues that we should explain the distinctions case by case. The basic reason is that Hershovitz thinks the attempt to characterize the legal domain of morality rests on a mistake, since he argues that distinguish law from the rest of morality in different ways for different purposes.}\]

\[\text{\footnotesize Parts of this section and the next are adapted from my forthcoming response to Greenberg and Hershovitz on the Yale Law Journal Forum, the online supplement.}\]

\[\text{\footnotesize Greenberg, supra note 1, at 1306.}\]

\[\text{\footnotesize Greenberg, supra note 1, at 1306. Like Greenberg, I use legal obligations to illustrate points throughout this section. But the reader should keep rights, powers, and immunities in mind too.}\]

\[\text{\footnotesize Greenberg, supra note 1, at 1307.}\]
legal obligations, on Greenberg’s view, only if they are *decisive*.\(^{17}\) Greenberg recognizes that the force condition alone won’t distinguish moral obligations that are legal obligations from moral obligations that aren’t. The characterization will still include too much.\(^{18}\)

Second, then, Greenberg proposes to distinguish legal facts by the way they originate in the actions of legal and political institutions. His suggestion is that that moral facts are legal facts only if they’re *affected* by the actions of legal institutions *in the legally proper way*. Call this Greenberg’s source condition. He includes these changes in response to distinct concerns. Greenberg’s initial view held that legal obligations were moral obligations *created* (or newly triggered) by the actions of legal and political institutions. But some legal obligations seem redundant from a moral perspective, in the sense that they have the same content as preexisting moral obligations. Greenberg worries that this could imply that certain paradigm legal obligations aren’t legal obligations on his view. For example, our all-things-considered moral obligations not to commit violent acts aren’t *created* by the actions of legal and political institutions. In response to this worry, Greenberg relaxes the required connection between the actions of legal and political institutions and the resulting moral facts. It’s enough, he argues, if our moral obligations are *affected* by our community’s legal and political history.\(^{19}\)

Greenberg’s initial view also held that *all* the moral obligations created by the actions of legal institutions were legal obligations. This sweeps in too many “downstream” and “paradoxical” obligations. We encountered “downstream” cases above: when the legal institutions move to change the traffic code, their actions have cascading moral effects, but

\(^{17}\) He considers but rejects the idea that legal obligations are merely *pro tanto* moral obligations, which bear on what to do but don’t by themselves settle the issue. But he claims to reject this tentatively. Greenberg, *supra* note 1, at 1307 n.41. One goal I have in this section is to press Greenberg to reconsider. The alternative I outline below is similar to the view that legal obligations simply certain *pro tanto* obligations. As I explain, however, I don’t think it’s best to sort them out by their moral force.

\(^{18}\) We might have many obligations with the appropriate force—e.g., to point out the resulting traffic patterns to our children so they can avoid injury—that aren’t plausibly legal obligations.

\(^{19}\) For example, we have preexisting moral obligations not to drive impaired, but their contents are somewhat imprecise. Greenberg’s thought is that our community’s legal and political history changes this. For instance, the idea is that a legislature’s decision to prohibit drunk driving (where ‘drunkenness’ is tied to some publicly measurable standard) affects the content of our preexisting obligation. Our legal and political history has some moral effect, so we can regard the obligations as legal. Greenberg also says that certain moral obligations might be legal obligations in the sense that the community’s legal and political history gives us extra reason not to do what we already have decisive reason not to do. I won’t discuss this amendment to the view.
we shouldn’t regard all of them as legal. It’s also easy to imagine what Greenberg calls “paradoxical” cases: we can imagine circumstances in which the actions of our legal and political institutions would create moral obligations to vote the crooks out, to protest, to resist violently, even to simply flee. We wouldn’t regard any of these obligations as legal, even though they would trace to the appropriate source. The challenge is to say why. Greenberg’s answer is that, in these cases, the actions of our legal institutions wouldn’t affect our moral obligations in the legally proper way, and hence we shouldn’t regard the obligations as legal. Greenberg acknowledges that this condition is in large part a placeholder for a future account of what it is to affect the moral facts in the legally proper way. But it gives voice to our natural response to downstream and paradoxical cases: they involve obligations that didn’t arise “in the right way.” And it’s not merely a placeholder: Greenberg argues that we can give it some content by appealing to what legal systems are for.

In the end, then, Greenberg’s considered view is this: a community’s legal facts are just those all-things-considered moral facts affected by the actions of its legal and political institutions in the legally proper way. These conditions characterize a set of moral facts, which we can think of as a “legal domain” of morality. The hope is that it might adequately fit and explain our confident judgments about the legal facts.

B. Objections to Greenberg’s conditions

There are reasons to think Greenberg’s conditions won’t do this. I will focus on Greenberg’s attempt to distinguish legal obligations by their force, though I have concerns about his attempt to distinguish them by source too. The problem with Greenberg’s force condition is straightforward: it seems to imply that we have many fewer legal obligations than we ordinarily think, or that the legal obligations we have are much stronger than we

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20 See Greenberg, supra note 1, at 1321-22

21 Greenberg, supra note 1, at 1321 n.69, 1323.

22 My primary concern is that it’s not very informative as stated (a point Greenberg acknowledges).
ordinarily think. We ordinarily think that legal obligations can conflict with moral obligations. Greenberg’s view doesn’t rule this out, at least not entirely. He allows that we can face conflicts between legal obligations and pro tanto moral obligations. But part of what we ordinarily think, I take it, is that we can face conflicts between legal obligations and moral obligations where the thing to do is to fulfill our moral obligations. Greenberg’s view rules this out. He holds that legal obligations are all-things-considered moral obligations, and that all-things-considered moral obligations settle the question of what to do. It can only appear that the thing to do is to violate a legal obligation: in reality, either we have no legal obligation, or the thing to do is fulfill it.

Does this in fact conflict with common sense? It seems to. Consider a case involving prudential concerns (broadly speaking). You’ve been unemployed for a few difficult months but today you have an interview for a good job. You left at a responsible time but ran into terrible traffic. You arrive with just minutes to spare and frantically look for a parking space. You find what seems like an open space but a city sign clearly says: “No parking”. You draw the conclusion we all draw: that you have a legal obligation not to park there. You take everything into account: is parking there the thing to do, despite your legal obligation not to? I’m inclined to think it is, though of course you’re on the hook for a ticket, perhaps worse. Or consider a second case, this one involving more urgent moral concerns. Imagine—as is true many places—that you have a legal obligation not to buy, possess, or distribute marijuana, even if you plan to use it as medicine. But suppose that one of your parents is undergoing chemotherapy and suffering from debilitating nausea that prescription antiemetics aren’t fixing. You know that marijuana often helps in cases of stubborn nausea like this, and you know can buy it on the black market without much difficulty or risk. You take everything into account: ought you buy the drug to mitigate your parent’s suffering? It seems to me that you should, despite your legal obligation not to. Greenberg’s view doesn’t

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23 Similar problems arise when we try to apply the force condition to legal powers, privileges, permissions, and so on. Greenberg, supra note 1, at 1308.

24 To be more careful: I think there are some cases like this case where parking illegally is the thing to do. This idea that you seem answerable to the law for parking there is a point that I return to below. Here I invoke the idea to make two points: first, that being answerable to the law doesn’t always settle what to do; and second, that because you’re still answerable to the law, it’s hard to accept that you had no legal obligation not to park there.
let him describe the cases this way: he must say that our moral responses are misguided or that these aren’t cases where we’re under legal obligations at all.\footnote{Greenberg might respond that these are cases where your actions are illegal, but not cases where you violate your legal obligations. He might say something like: a standard is a legal standard just in case it’s a standard that legal institutions have the standing to hold you to, and that an act is illegal just in case a legal standard doesn’t allow it (where ‘allow’ is explained in such a way that we can say that the proposition expressed by the sentence “Every car must be white” doesn’t allow red cars). Greenberg might then say we have legal obligations only when the fact that some act is illegal is decisive. In substance, this is close to the view I outline below. But I see several reasons not to describe the underlying facts this way. First, many people I’ve talked to reject part of the distinction, and think claims about illegality entail claims about legal obligation. Second, there’s pressure to make room for non-decisive legal obligations from another direction. Here’s an example Scott Hershovitz offered. Suppose keeping my children fed and clothed requires me to violate my legal obligation to pay my mortgage today. If so, the thing to do is to ignore my legal obligation and use the money to take care of my children. But we would hesitate to describe what I’ve done as illegal, since we hesitate (I find) to describe private wrongs as illegal acts.}

These are strange recommendations. And our judgments about particular cases aren’t the only issue. Greenberg’s view challenges the way we understand legal obligations in general. For example, the question of whether there is a general obligation to obey the law is controversial, and most people who’ve looked at the question think there is not. Greenberg’s theory implies that there is (unless Greenberg doesn’t think we have a general obligation to fulfill our all-things-considered obligations or he construes the question as something other than whether we have a general obligation to fulfill our legal obligations). In a similar way, Greenberg’s theory seems incompatible with the most straightforward account of civil disobedience—after all, if civil disobedients are right about their reasons, then they might have no legal obligations to violate.\footnote{Compare with Liam Murphy, Better to See Law This Way, 83 N.Y.U. L. REV. 1088, 1107 (2008) (rejecting a view on the grounds that it would be “ridiculous to propose that, properly understood, there are no crimes”).}

My point is not that Greenberg has nothing to say in response, or that his responses could not be plausible. But Greenberg’s force condition recommends judgments that we reject with confidence, and at some cost to his theory.\footnote{Greenberg correctly points out that we often accept philosophical theories despite their costs. Greenberg, supra note 1, at 1338. What benefits justify the costs of the force condition? Greenberg doesn’t say as much about this question as you would hope. But Greenberg seems to think that the force condition better fits and explain other parts of our legal practice, and pays its way there. I pursue some of these arguments further in my forthcoming response to Greenberg and Hershovitz. But I want to include an overview of one argument in this long note, just to make it clear that I’m not rejecting Greenberg’s suggestion too quickly. Greenberg seems to think the force condition fits and justifies our ordinary views about the state’s coercive enforcement of our legal obligations. We ordinarily think that, in general, the state is morally permitted to coerce people to fulfill their legal obligations (or to sanction them for failing to). And Greenberg points out that, “in general it is not morally permissible to coerce someone to take a particular action (or to

\footnote{Greenberg might respond that these are cases where your actions are illegal, but not cases where you violate your legal obligations. He might say something like: a standard is a legal standard just in case it’s a standard that legal institutions have the standing to hold you to, and that an act is illegal just in case a legal standard doesn’t allow it (where ‘allow’ is explained in such a way that we can say that the proposition expressed by the sentence “Every car must be white” doesn’t allow red cars). Greenberg might then say we have legal obligations only when the fact that some act is illegal is decisive. In substance, this is close to the view I outline below. But I see several reasons not to describe the underlying facts this way. First, many people I’ve talked to reject part of the distinction, and think claims about illegality entail claims about legal obligation. Second, there’s pressure to make room for non-decisive legal obligations from another direction. Here’s an example Scott Hershovitz offered. Suppose keeping my children fed and clothed requires me to violate my legal obligation to pay my mortgage today. If so, the thing to do is to ignore my legal obligation and use the money to take care of my children. But we would hesitate to describe what I’ve done as illegal, since we hesitate (I find) to describe private wrongs as illegal acts.}
give up Greenberg’s force condition. What becomes of Greenberg’s theory? The most natural response is simply keep the source condition and drop the force condition. The resulting view would be that legal obligations are the moral obligations (whether pro tanto or all-things-considered) affected by the actions of legal institutions in the legally proper way. In fact, Greenberg indicates that this might be his fallback position. I think this is on the right track. Even so, I want to take this opportunity to rethink the way the law-as-morality proponents might characterize a legal domain of morality.

C. Locating law within morality: a suggestion

Legal practice involves questions (and competing claims) about the exact distribution of legal rights, obligations, powers, and immunities, and takes the correct answers to these questions to have great practical import. In other words, an important part of the practice turns on moral notions like ‘right’ and ‘obligation.’ In a way, Greenberg’s insight (shared by

sanction him for not taking it) if it is morally permissible for him not to." Mark Greenberg, The Standard Picture and its Discontents, in Oxford Studies in Philosophy of Law 39, 85 n.52 (Leslie Green & Brian Leiter eds., 2011). I will concede for the sake of argument that these claims are true. Here’s one way they might support the force condition. These premises appear to imply that it is not permissible for people not to fulfill their legal obligations. The force condition might enable us to explain the truth of this implied conclusion: the claim that legal obligations are decisive would explain why people are not free not to fulfill their legal obligations, since they are not free not to fulfill their decisive moral obligations (by definition). So the force condition promises to fit and help explain our ordinary views, which would give us some reason to accept it. But there are problems with this argument. The problem starts with the fact that the premises imply less. Both make claims about actions that are or are not permissible “in general.” At best, then, they support the claim that, in general, it is not morally permissible for people not to fulfill their legal obligations. We could “fix” the argument by strengthening the premises or accepting the weakened conclusion. But both options make the case for the force condition less plausible. First, consider the strengthened premises. The problem is that they likely false, which is presumably why Greenberg endorses the hedged generalizations. So we won’t need the force condition to explain why they—or the claims they imply—are true. Second, consider the weakened conclusion. The problem is that the inference to the force condition looks much worse. The revised challenge is only to explain why people are not morally free not to fulfill their legal obligations in general. And we might explain this weaker claim more easily, without supposing that legal obligations are always decisive. In fact, the force condition isn’t a good explanation of the weaker claim, because it explains too much: it doesn’t even allow for the exceptions that the generalization includes. The upshot seems to be that our ordinary thoughts about the state’s coercive enforcement of legal obligations don’t give us reason to accept the force condition.

Greenberg also offers arguments that appeal to normal parlance; the need to explain and vindicate the fact that legal institutions treat legal obligations as if they are decisive; and the need to explain how most familiar legal systems satisfy what he calls the bindingness hypothesis. I explore these arguments in more detail elsewhere. But I don’t think any offers much support to the idea that legal obligations must be decisive.

See Greenberg, supra note 1, at 1307 n.41.

I’m not committed to the idea that the view I’m about to outline must be an alternative to Greenberg’s fallback view. The idea that legal obligations (and other legal facts) are those triggered or affected in the legally proper ways is quite flexible. One might interpret what I say as outlining a condition on what it is for an obligation to have arisen in the legally proper way.
other law-as-morality proponents) is to take legal practice at face value. Greenberg argues that legal rights and obligations could be what they seem: moral rights and obligations with a special connection to and relevance for legal practice.

To make the case, Greenberg stresses the source and force of some of our moral obligations. These don’t seem to be the right points to stress, for the reasons I’ve given. But Greenberg might have tried to make the case by stressing a point about the moral notions involved. There’s no one view about this, of course, but one standard view about notions like ‘right,’ ‘obligation,’ and especially about ‘power’ and ‘immunity’ is that they are fundamentally relational: they refer to constituent parts of the moral relationships individuals stand in to one another.\textsuperscript{30} To fully characterize the moral facts, on this sort of view, we would have to characterize the complex web of moral relationships that individuals stand in to one another.\textsuperscript{31} So if legal facts simply were certain moral facts, then to fully characterize the legal facts, we would have to characterize part of the complex web of moral relationships that individuals stand in to one another.

This suggests an alternative approach to characterizing a legal domain of morality. Legal facts are moral facts, we might say, but they are primarily distinguished from other moral facts by the moral relationships in which they figure, not by their practical force or their source in our legal practice. Here’s a working hypothesis. Legal and political institutions (and their representatives) are the parties that distinguish moral relationships in which legal facts figure from other moral relationships.\textsuperscript{32} In particular, the idea is that legal facts are moral facts that figure in the moral relationship between a community’s legal and political institutions and its individual members. Let’s think about this in terms of legal obligation. One way to understand obligation is by its connection to accountability or

\textsuperscript{30} See, e.g., Wesley Hohfeld, \emph{Fundamental Legal Conceptions as Applied in Judicial Reasoning}, 26 \textsc{Yale L.J.} 710 (1917).

\textsuperscript{31} That might not be all we need to do. One open question is whether morality recommends more than it demands. If it does, then we would need to account for these other moral facts too.

\textsuperscript{32} Any reader looking for a careful explanation of what legal and political institutions are is no doubt disappointed by now. I am sorry to disappoint! I have some thoughts, but they are thinly sketched. I hope to develop them in future versions of this paper. For now, I will rely on our shared ability to classify institutions as legal or not, at least more or less. I also direct you to Greenberg’s thoughts on this issue, though I don’t endorse everything he says. \textit{See} Greenberg, \textit{supra} note 1, at 1323-1325.
answerability. Obligatory actions are those we are accountable to others (including ourselves and perhaps everyone) for performing, and this sets them apart from actions that are only recommended (no matter how strongly). We might distinguish our legal obligations, then, as those moral obligations that legal institutions have the distinctive standing to hold us to, a standing that characteristically involves the standing to impose sanctions.

So far, this puts the view in terms of the characteristic powers (i.e., the standing to hold to account) that figure in the moral relationship between a community’s legal and political institutions and its members. We can also put it in terms of the characteristic liabilities involved, which I find easier to think about. (This no doubt has something to do with the fact that I am a mere citizen.) That is, we can say that legal obligations are distinguished from other obligations by the liabilities we incur for failing to fulfill them: specifically, they make us liable to certain responses from the legal institutions themselves. We can call this condition the legal liability condition, as long as we keep in mind that it refers to a genuine moral liability to account-seeking responses from legal institutions. That’s a start, but we need to make some refinements.

First, we need to specify the role legal institutions play more carefully. Given what I have said, it’s tempting to conclude that legal obligations are obligations we have to legal institutions, much as our promissory obligations are obligations to people to whom we have made promises. This would explain the distinctive powers and liabilities that I have suggested mark the legal domain of morality. But that conclusion wouldn’t adequately fit

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33 My thinking about these issues has been helped and influenced by Stephen Darwall’s account of these moral relationships in terms of “second personal” notions like standing to make demands and answerability. See Stephen Darwall, The Second-Person Standpoint: Morality, Respect, and Accountability (2006). Darwall’s brief application of these ideas to the law has special relevance. See Stephen Darwall, Morality, Authority, & Law: Essays in Second-Personal Ethics I (2013). The big difference is that Darwall doesn’t take a stand on the question of whether legal obligations simply are certain moral obligations or whether they merely “purport” to be. In contrast, I defend a version of the claim that legal facts simply are certain moral facts.

34 Greenberg hints at these ideas in some places. For example, he mentions that the actions of legal and political institutions can create new remedies for the violation of preexisting obligations, which is one way in which their actions are non-redundant.
what we ordinarily think, or so it seems to me.³⁵ Most important, it doesn’t seem to fit the obligations we recognize in tort or contract, which we nevertheless regard as legal obligations. These obligations are to other individuals in the community, not to the community’s legal institutions, or even to the community itself. Nor does it seem to fit the obligations we recognize in the criminal law. The idea that our criminal law obligations are obligations to the community’s legal institutions is more plausible than the corresponding claim about our private law obligations. But it still seems that most criminal law obligations are owed—if they are owed to anyone in particular—to the victims of criminal conduct, or perhaps the community at large. The upshot is that if our legal obligations are distinguished by their role in our moral relationship to legal institutions, it’s not because the community’s legal institutions are the obligees to we obligors. Here’s an attempt to account for their role in a less direct way:

An act is legally obligatory for an individual just in case its omission would—without further action by legal or political institutions—make that individual morally liable to be held accountable through legal processes.³⁶

The basic idea remains that legal obligations are distinguished from other moral obligations by the distinctive moral liability one incurs for failing to fulfill them. But here the distinctive liability is not to an account-seeking response from legal institutions themselves, at least not always. The distinctive liability is to be held to account through processes that are supervised and enforced by legal institutions, which have the standing to do so.

This updated proposal connects your having a legal obligation to a distinctive kind of accountability, and in particular to how you are liable to be held to account. But it doesn’t

³⁵ You might doubt that I can coherently maintain this. You might think the standing to hold accountable requires the standing to expect or demand that someone not conduct themselves in certain ways in the first place. And you might think this standing to expect or demand implies that the liable party was subject to your expectations or demands. But to be subject to demands in this way simply is to have a duty to the person with the standing to make the demand (This is roughly Hohfeld’s claim about the connection between claim rights and duties.) I concede that to be legally obligated is to have duties to legal institutions in this technical sense. But I find that ‘duty to’ is a misleading way to describe being subject to a claim. It seems to me that ‘duty to’ or ‘obligation to’ is best reserved to moral relationships that involve certain kinds of standing (e.g., to waive obligations, to forgive their violation, and so on). In the text, I use ‘obligation to’ to refer to these more robust moral relationships, and ‘subject to some claim’ or ‘subject to some legitimate expectation or demand’ to refer to the less robust moral relationship.

³⁶ Why the clause about further action? We don’t want to say that you actually have the legal obligations you would have had if the community’s legal and political institutions had acted otherwise.
say to whom you are liable to be held to account. The flexibility is intentional, to account for the difference between private legal obligations and other legal obligations. What unites legal obligations, on this picture, is a liability to be held accountable through processes that legal institutions have the standing to supervise and enforce. What divides legal obligations, however, is where normative control of these proceedings lies. In the criminal law, the legal institutions themselves have the standing to hold you to account through adjudicative processes (perhaps on behalf of the community at large). In the private law, on the other hand, normative control rests with the party whose claims have been infringed or violated, whether these parties are legal or political institutions (as in disputes about government contracts, say) or private individuals.

Second, there is at least one more wrinkle. A familiar fact is that many individuals lack legal liability as I’ve defined it, yet we regard them as having legal obligations. The most obvious cases include police officers, judges, and other government actors. But there are other cases, including fiduciaries. It would be a problem if I were forced to conclude that these individuals lack the legal obligations we ordinarily regard them as having (or that we lacked the legal rights against them that we ordinarily regard ourselves as having). But I don’t think I do. In fact, I think the practice provides the solution to this problem. We regard these individuals as lacking legal liability only because they’ve been granted some degree of immunity. The actions of legal and political institutions succeed in making them unanswerable in cases where they otherwise would be. We might revise the legal liability condition to encompass this point.

An act is legally obligatory for an individual just in case its omission would—without further action by legal or political institutions, and absent a specific immunity—make that individual morally liable to be held accountable through legal processes.

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37 You might worry that this doesn’t fully address the problem for my view presented by, say, the judge’s role. We might ordinarily think that judges have legal obligations that go beyond what they are answerable to Congress for doing, and beyond what they would be answerable for in adjudicative processes were they to lack the immunities they in fact have. I can’t rule this out, but I would have to hear about these putative obligations in more detail. I suspect that if we point to judicial obligations that involve only moral liability, then we will find that we already regard these as moral obligations someone has in virtue of occupying a legal role, not legal obligations. If I’m wrong about this, then this might be a point where the law-as-morality framework recommends revision.
There is no doubt more to say about this. But let me finish this section by explaining why this seems like a promising way to proceed in general, even if the details aren’t yet right.

First, the legal liability condition doesn’t imply Greenberg’s force condition or its problems. For example, the question of my having an obligation to you is a moral question, to be sure, but a question about the structure of our moral relationship. Roughly put: do you have the standing to hold me accountable for acting a certain way? The question of what force this fact has is a further moral question. So this approach to distinguishing law from morality might enable us to separate the question of what the legal facts are from the question of their force.\textsuperscript{38} Given this, the legal liability condition promises to explain cases involving prudential or moral emergencies in a way that better fits with what we ordinarily think about legal obligation. Consider, for example, the case where I’m late for an important job interview and decide to park illegally. I have a legal obligation not to park there, in the sense that the police have the standing to demand that I don’t and to ticket me if I do. But we recognize that this doesn’t automatically exclude my having enough reason to park there.

Second, it promises to explain some of the phenomena Greenberg put forward to motivate the claim that legal obligations must arise “in the legally proper ways.”\textsuperscript{39} The first of these problems, recall, involves legal obligations that seem redundant because their content coincides with the content of preexisting moral obligations. The legal liability condition promises to confirm that the actions of legal and political institutions aren’t idle: they succeed in generating non-redundant moral liabilities. This might sound strange. But it’s a familiar enough idea that we can make ourselves \textit{newly} accountable for acting in ways

\textsuperscript{38} This point echoes a point Dworkin makes in \textit{Law’s Empire}. \textsc{Ronald Dworkin, Law’s Empire} 108–113 (1986).

\textsuperscript{39} I want to note that I am not assuming that the legal liability condition can answer concerns about the force and source of our legal obligations all by itself. A full substantive theory of our legal obligations—as distinct from my attempt to say what such a theory would be a theory \textit{of}—would have to explain the conditions under which we have legal obligations that rules out “downstream” or “paradoxical” obligations. It would also have to explain whether legal obligations have characteristic force in our deliberations about what to do. So I don’t claim that we can leave concerns about source and force behind. I simply don’t think they are best answered at the stage where our goal is to establish that the question at issue in legal disputes is a particular moral question.
that we are *already* accountable for acting. I might promise my partner that I’ll exercise more often, and then later promise my mom the same thing.

Let’s turn our attention to the other problem that motivates Greenberg’s source condition: the problem of “paradoxical” and “downstream” obligations. The problem, recall, is that the actions of legal and political institutions bring about many moral obligations—including, perhaps, obligations to resist or flee, and obligations to leave earlier for appointments—that couldn’t plausibly be legal facts. The legal liability condition seems to explain why these sorts of obligations won’t count as legal obligations. The *legal* obligations, roughly put, are the obligations that legal institutions have the distinctive standing to hold us accountable for fulfilling. Any obligations we have to resist or flee wicked legal institutions won’t have this feature. And the same thought explains why my obligation to drive slower is a legal obligation but my obligation to leave earlier for appointments isn’t. The effect is that legal institutions have the standing to hold me to the posted speed. But they aren’t also granted distinctive standing to complain if I’m late for my lunch appointment.

**D. The problem of “judicial underenforcement”**

The working thesis is that legal facts are moral facts that figure in the moral relationship between a community’s legal institutions and its individual members. In particular, the hypothesis is that legal obligations are *legal* because they involve a moral liability to be held to account in legal institutions through legal processes. In a slogan: no legal obligation without legal liability. In this section, I consider an apparent counterexample.

In *Justice for Hedgehogs*, Ronald Dworkin defends a version of the law-as-morality framework, and offers a partial characterization of the legal domain of morality. Dworkin focuses his characterization on legal rights: “legal rights are those that people are entitled to enforce on demand without further legislative intervention in adjudicative institutions that

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41 I can change your obligations by attacking your family, perhaps, but they won’t be obligations that I have any standing to hold you to!
direct the executive power of sheriff or police.” This is similar to the characterization I am offering, except that it emphasizes the special standing one has to protect certain rights through legal processes, not the special liability one incurs for some conduct. These partial views might well converge once spelled out, if not in their details then in their overall effect. But it’s hard to be sure, since Dworkin’s remarks are compact, and he makes the point in several different ways. For now, the important point is that Lawrence Sager and Mark Greenberg (citing Sager) argue that Dworkin’s proposal is inadequate, and their remarks might be refashioned as an objection to my proposal. I will explain their objection, and why I don’t think it succeeds.

Sager and Greenberg base their objection on Sager’s research on “judicial underenforcement.” The idea of judicial underenforcement, as I understand it, is that our legal rights and obligations are not limited to those that courts recognize and enforce. In part, this is the claim that, as a matter of fact, courts fail to enforce all the legal rights and obligations people have. But it’s not only this claim. It is also the claim that courts are sometimes right to do so: there are legal rights and obligations that the courts should not enforce. As Sager puts it, speaking of constitutional rights: “a conscientious constitutional court will on some occasions stop short of fully enforcing the Constitution because of particular features of the judicial process, but [these] institutional limitations on the judiciary do not mark the substantive boundaries of the Constitution.” Sager argues, for instance, that the Constitution’s equal protection clause generates rights and obligations courts routinely decline to recognize or enforce, and for good reason. Courts have good reasons to defer to the legislature in some cases, and to mind their own limited competence in others. Sager also argues that the distinction between law and judicial enforcement is implicit in what’s called the political question doctrine, according to which, roughly put,

42 See Dworkin, supra note 1, at 406.

43 See Dworkin, supra note 1, at 406, 407, 410.


45 Sager, Fair Measure, supra note 38 at 1215-1218.
courts should decline to address controversies that involve certain “political questions,” questions of legal rights and obligations best enforced through political mechanisms.\textsuperscript{46}

Let’s grant that Sager is right about judicial underenforcement. The concern here is his claim that it presents a problem for Dworkin’s characterization of legal rights. Sager writes: “[Dworkin’s] claim, in a nutshell, is that law by its very nature must be susceptible of judicial enforcement. To the degree that courts are poorly situated to enforce material rights, it follows that such rights are not legal rights at all.”\textsuperscript{47} Greenberg, citing Sager, makes the same basic objection to two versions of Dworkin’s proposal (whose differences don’t matter in this context): “‘A serious problem with both positions is that they rule out in principle the possibility of legal obligations that the courts and similar institutions—because of, e.g., their institutional limitations, their relations with other branches of government, and the like—should not enforce.’\textsuperscript{48} The problem, then, is that on Dworkin’s view all legal rights are enforceable on demand, when in reality courts should not enforce all legal rights. So Dworkin’s characterization of the legal domain of morality fails to fit what we ordinarily think about legal rights and obligations.

I think there’s a straightforward response to this kind of objection. Dworkin claims that legal rights are \textit{enforceable} on demand in adjudicative institutions. Sager and Greenberg seem to assume this commits Dworkin to the claim that legal rights \textit{should be enforced} on demand in adjudicative institutions. Since not all legal rights should be enforced (let’s grant them), it follows that not all legal rights are enforceable on demand. That is one way to read ‘enforceable,’ but I don’t think it’s the reading Dworkin intends. At points, Dworkin writes that legal rights are those that people are “entitled to enforce on demand” and “in principle [legal rights] entitle individual members of the community to secure what they ask through processes directly available,” and these don’t seem to commit him to the claim that courts should enforce legal rights.\textsuperscript{49}

\textsuperscript{46} Sager, \textit{Fair Measure}, \textit{supra} note 38 at 1224.

\textsuperscript{47} Sager, \textit{Material Rights}, \textit{supra} note 38 at 580.

\textsuperscript{48} See Greenberg, \textit{supra} note 1, at 1299 n.28.

\textsuperscript{49} See Dworkin, \textit{supra} note 1, at 406. I won’t try to determine whether Sager’s stated objection to Dworkin’s stated view succeeds.
More important, at least for our purposes, is that Dworkin can adopt the reading on which “enforceable on demand” is understood as something akin the standing to demand that the court protect your rights (or the standing to demand that the courts provide you the means through which to hold accountable the individual who infringed your rights). This analysis does not imply that courts should, taking everything into consideration, enforce all legal rights.\textsuperscript{50} Courts may find that they have good reason to enforce less than they have the standing to enforce, and to enforce fewer rights than individuals have the standing to demand that the courts enforce. These points might sound strange, but they have analogues in our everyday moral relationships. It's familiar part of moral life that we should often do less than we have the standing to do, and that we should sometimes give others less than they have the standing to demand of us. So it's possible to reconcile Dworkin's characterization of the legal domain of morality with the fact of judicial underenforcement. And I think similar considerations show that it's also possible to reconcile the legal liability condition with the fact of judicial underenforcement.

**Concluding remarks**

Let me conclude by anticipating another sort of objection. One might worry that view I am developing explains too little. It doesn't tell us whether have any legal obligations, or what they are, or how and why the actions of legal and political institutions make them what they are. I accept the substance of (and feel the force of) this criticism, but I don't regard it as an objection, at least at this stage of the project. The hope is that by seeing law as morality, we might better understand our legal practice, and better see how to answer the central questions we have about it. At this point, however, I am primarily interested in whether and how to see law as morality. The attempt to characterize a legal domain of morality is just part of this project. It's an attempt to capture—within the law-as-morality framework—what's at issue in disputes about legal rights and obligations. My tentative proposal is, roughly put, that our disputes about the legal facts are best understood as disputes about the sorts of conduct that make us morally accountable to one another through legal processes. If this fits and explains what we ordinarily think about the legal

\textsuperscript{50} It might imply that courts should enforce them in the absence of any reasons or claims to the contrary. But that's compatible with the thesis of judicial underenforcement.
facts, then it's some reason to think we can see law as morality. We’d then be on our way to addressing the difficult issues posed at the start of this paragraph. (If it doesn’t fit and explain what we ordinarily think about the legal facts, then I will have to rethink what I’ve proposed or try to see law some other way.)