* Phil of Law 4/18
* Pretty exclusively weve been talking about positive theories of law
  + Aka: solely social facts (rule of recognition, planning organization, etc)
  + Morality if it comes into play at all to determine the content of the law, is because social facts say so
* Today: very different. We are saying the content of the law is essentially moral, always necessarily determined by morality.
* Greenburgs Theory of Law: Moral impact Theory of Law
  + Shift of circumstances around your decision making (social fact about legal practices) the law is the moral obligation that arises from that shift of circumstances
    - More than just moral obligations, it also includes privileges, rights, powers, the whole moral gambit.
  + Securities Exchange Act
    - The piece of paper, the practices people are doing, none of that is the law.
    - The law is what morally changed as a result of that.
      * His responses to this seemingly counter intuitive fact:
        + we can have a concept of an authoritative legal text that captures the SEA
        + even positivists agree that the law is something other the paper

the law is the legal content that is created by the piece of paper.

* + How is this different from Dworkins reading?
    - Upstream/downstream
    - In Dworkin the law is what justifies the legal practices. We have these practices and then we have to interpret them to determine the moral principles/moralish principles that justify them. Dworkin is trying to get at that there are other obligations besides moral obligations and trying to make them real. Legal obligations are associative obligations and can conflict with moral obligations. So for Dworkin there is a tension.
    - Here, the legal content is the result of the effect actions of legal institutions on our moral profile. Things here are pretty simple. Moral changes happen directly as a response to changes in the actions. For Greenburg there is no need to make moral and legal obligations distinct, legal obligations are just a type of moral obligations. Therefore, Greenburg doesn't have this tension.
  + Legal prohibition on murder – how does that change your moral profile – you already had a moral obligation not to murder?
    - Morality has some problems, it doesn't tell you exactly how you should be punished, when murder is ok (self-defense) etc. So law can solve these problems, and that will change your moral profile
    - It would be bad if people can punish at will in the state of nature, it would be morally better if one person has the ability to punish and we all now morally cannot punish.
  + The nature of the law or a legal system is supposed to change our moral obligations to improve our moral situation. Sometimes we are worse off because of the ambiguity of morality.
    - Runs through examples:
      * 1) state of nature: seems like a Kantian, if there is a government you are morally obligated to allow them to punish instead of you because getting out of the state of nature is better
      * 2) the advance notice of punishment. Morally permitted to punish in the state of nature, but there may be surprises about what those punishments are. Morality doesn't give its own advance notice. But legal systems do.
      * 3) solving coordination problems. Legal institutions can solve coordination problems which give you a moral obligation to follow them. Duty obligation to solve them but don't know how. Legal institutions clarify.
      * 4) if there is a representative government there is an ability to harness the moral power of democracy
        + does not think that there is a duty to obey the decisions of a democracy but it can be morally relevant
      * 5) contract law, indeterminacy, if I make a promise to you in the state of nature and I break it. We don't know what my duty to you now is. Contract law, via the legal system, we will now know since we enter the contract in light of the legal system help make more of our moral obligations determinate.
      * 6) taxes. Legal system solves what we owe to society to help each other. We have a general moral obligation to help. But the existence of the government will create an obligation to pay taxes which comes from the general moral obligation to help. Kind of like a coordination problem because unlike the state of nature, a government allows us to know how we are morally obligated to pay/to who and this is better than our general moral obligation because it was too indeterminate. (ex: subway system, water system, etc)
      * 7) prisoners dilemma (to fish or not to fish that is the question,) absent assurance that other people will not fish it’s morally permissible to fish. You don't have a moral duty to be a chump. Assurance from legal institution that other people are also not going to fish, then I have a duty not to fish too. If I know other people are going to pay for the subway, than I have a moral obligation to pay too. Law creates these better moral obligations
  + Seems like a negative view of private ordering, because we apparently need a law to overcome these problems. Is it true, which Greenburg seems to be assuming, that private resolution of these problems is impossible?
    - In a private interaction you use moral considerations to determine how to act. The law just does the same thing but at a wider breadth.
    - Question is a little more specific than that though. It could be compatible with his theory that maybe law is even worse than private resolution. Maybe a better world is one where there is no law. But he is just talking about law. and his theory of law is that law is the change in moral obligation in response to changes in social facts.
      * What is this theory of legal institutions? You need a theory of a legal institution for his theory to understand whose moral impact creates the content of law. Because legal institutions create the content of law that changes our moral obligations. He looks to lots of other people’s arguments on what a legal institution is (including Shapiro and Raz)
  + How is this different than the Moral Aim Theory?
    - Moral Aim theory, morality is the goal, but the plan you make and act on might not actually change your moral obligations.
    - For Greenburg, your moral obligation has to actually be changed for the better for there to be law.
      * Nazi problem.
  + Let’s suppose the government persecutes a particular minority group. How does he distinguish between things that are not law (duty to resist, duty to try and change government, etc) and the things we were talking about earlier (taking us out of the state of nature, making our moral obligations more specific, etc)
    - Not all moral changes create legal content unless they are created in the legally proper way.
      * What does legally proper way mean? Lets say the answer is that it is in accordance with legal content. that would be circular because legal content is what is supposed to be defined here - we can’t use legal content in the definition
      * moral obligations created in the legally proper way means that they are positive (Ex: create a subway system. Having to pay is a positive moral obligation, we are in a better place with a clearer moral obligation) He says the positive ones are the legal obligations. (Ex: prosecute minority, creates a moral obligation to resist. He says this would be a negative one which isn’t a legal obligation because it doesn't help solve a problem.)
        + The only time there is a legal obligation is when your moral situation has been improved by social facts 🡨 seems like the theory

But that doesn't seem like that can be right. There are tons of examples where you might not be in a better position but its described as a legal obligation.

Ex: old contract law that says A. court hears a contract case and misapplies the law and says B. Greenburg is pretty clear that wrong decisions by legal institutions can still create moral obligations and therefore be law

Why? Because of concepts of fairness, consistency, etc. Settling it and making it predictable can maybe arguably make it a better moral impact. And therefore, the wrong law should still continue to be applied.

* + Is there a moral duty to obey the law under Greenburgs theory?
    - Necessarily, always, yes. That's the point of the theory. Its an all-things-considered duty.
      * Green thinks this makes his theory more improbable.
  + Remember, its not just about the texts, its wrong to say the text doesn't matter, but the text is just to figure out what the moral consequences/changes have occurred to determine the obligation. The text itself doesn't create the obligation. It is the text in combination with the moral obligation.
  + Interpretation:
    - Greenberg thinks the benefit of his theory is that it better explains interpretive disagreements when deciding cases.
      * The usual view does not account for what courts are doing, but his theory does.
      * Standard Theory/Standard Picture Theory – content of the law is mainly the mental intention or language of the text, some linguistic content. Look to the text or the intent of the authoritative language. When the court is trying to figure out the law there is a direct relationship between that linguistic content and what the law means.
        + Austin saying laws are commands (thoughts or words).
        + Shapiro saying laws are plans (those are linguistic entities)
        + Hart (not sure if he is committed to the standard picture, legal content comes from the Rule of Recognition and it doesn't seem necessary that officials look to linguistic content to determine meaning of law)
  + Smith Case
    - Traded a firearm for a drug, and unclear if intention of law “higher penalty for using a weapon” is that meant to be using as in threatening with weapon or just a weapon involved
      * What do courts tend to look at here? What the text says, public meaning, what congress meant, various other things that are appealed to.
      * Greensburgs point is that while they say they are looking at these things it comes down to moral considerations because otherwise there is no explanation of why the court is weighing some considerations over others unless there is a moral consideration in the back bone.
      * Hart would say morality is just part of the rule of recognition (inclusive legal positivism)
      * Shapiro would say just look to the economy of trust and the master plan
      * Exclusive legal positivist would say that there wasn't an answer and they are appealing to morality to just make something up. There is no law on this and there isn’t law until there is an actual decision on the case.