“Murder Might Not Break the Law”

Review of Scott Hershovitz’s Law Is a Moral Practice

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Craig K. Agule

Title 18 § 2103 of the Pennsylvania Consolidated Statutes forbids me from insulting the Pennsylvania flag, no matter where I find it. Title 42 § 5552 forbids Pennsylvania’s prosecutors from holding me accountable now for insulting the flag in the distant past; the state has two years to initiate a prosecution, and no more. The First Amendment of the U.S. Constitution denies Congress the power to forbid expressive activity, and Gitlow v. New York, 268 U.S. 652 (1925), extends that denial to state governments. On a standard way of thinking about the law, the law is the set of norms (rights, powers, obligations, permissions, etc.) expressed in legal materials like statutes, constitutions, and court opinions, properly accounting for the sometimes-complicated ways those norms might reference, affect, or exclude each other. This standard way of thinking tells us about both the nature of law, viz., it is a set of norms, and the content of law, viz., the meanings expressed in the legal materials.[1]

In Law Is a Moral Practice (2024), Scott Hershovitz offers a contrasting account of the nature of law. We should not think of the law as a set of norms at all. Instead, Hershovitz argues that law is a moral practice. Legal activities like legislation, litigation, and judicial interpretation are “tools for adjusting our moral relationships, and they are typically employed for the purpose of doing so” (18). The enactment of § 2103 was aimed at giving the public a strong *moral* obligation not to insult the Pennsylvania flag and at making it *morally* permissible for prosecutors to bring the powerful force of the state to bear on us if we transgress that moral obligation. And what counts as the content of the law will depend on which bit of legal practice is important in the moment. Because law is a moral practice, there is no need to appeal to a distinctive domain of legal normativity, separate from ordinary moral normativity. A legal ought is a moral ought, albeit one with a particular causal history. The obligations and permissions stemming from § 2103 are the ordinary

[1] For a substantive, if partisanly critical, description of the standard view, see Mark Greenberg (2010); for defenses of the standard view in the face of Greenberg’s challenges, see Larry Alexander (2021) and Bill Watson (2022).

stuff of morality; what is distinctive here is the role of legal practice in the management of our ordinary moral lives. Thus, legal practices, and not legal norms, are at the heart of Hershovitz's jurisprudential picture.

In Chapter One, Hershovitz details and defends his central claim, that law is a practice aimed at adjusting our moral relationships. Legal practice has diverse moral effects: we create new obligations, we license new demands, and we provide for structures of accountability, for example. We see that these adjustments are the aim of the law when we look at the arguments that lawyers offer when the law is contested. In Chapter Two, Hershovitz turns to legal adjudication and interpretation; on his view, judicial disagreements are rooted in moral disagreements, both in fact and properly. For instance, the choice between abiding by the plain text of a statute and following the apparent purpose of a statute depends on moral claims about the roles and powers of legislatures and courts. In Chapter Three, Hershovitz takes on an important rival view, a view seemingly shared by positivists and anti-positivists, that the law is a set of norms. It is not hard to identify norms in our legal materials, such as "Do not insult Pennsylvania's flag". Hershovitz argues that there is no one set of norms that we should focus on to the exclusion of others, and so contrary to widespread agreement, the law cannot be *a* set of norms. Then, in Chapters Four and Five, Hershovitz turns to cases that test the match between legal norms and moral norms. Hershovitz looks at cases of deeply unjust legal activity, such as the passage of the Fugitive Slave Act, at cases where an ordinarily binding legal instruction seems morally trivial in the particular circumstances, and at cases of where the law's instructions seem to merely echo existing moral demands. In his two final chapters, Hershovitz turns to deference and expertise. In Chapter Six, Hershovitz offers an account of the virtue and significance of the rule of law; in order for us to garner the benefits that law can provide, we have to treat legal activity as morally significant, even if we (perhaps rightly or wrongly) would have legislated or ruled otherwise. Finally, in Chapter Seven, Hershovitz argues that legal expertise is moral expertise, which matters both for how we consider legal arguments and how we train lawyers.[2]

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[2] The bulk of the book is occupied by defending the moral-practice claim and exploring some of its implications. However, Hershovitz leaves the details of his view relatively gestural. We might ask: Which practices count as legal practices? Which moral consequences of legal practices count as legal? What is the relation between the content of legal texts and the resulting moral norms? Questions like these for practice views like Hershovitz's and moral-impact views like Greenberg's are explored by Brian Bix (2014), Hasan Dindjer (2020), Alexander (2021), Watson (2022), Angelo Ryu (2024), and Conor Crummey and George Pavlakos (2024), among others.

Law Is a Moral Practice is a charming book. Hershovitz is an engaging and sympathetic writer, and the text is filled with evocative cases and examples. Readers of Hershovitz's earlier Nasty, Brutish, and Short (2023) will enjoy the return of Hershovitz's sons Rex and Hank. Hershovitz uses life with them to vividly illustrate complex jurisprudential debates. In one extended example, Hank is flummoxed by his parents' insistence that a bowl is a plate, at least according to the rules of their house. The debate Hank and his parents have regarding his obligations at the family dinner table leads nicely into the arguments regarding the Affordable Care Act in King v. Burwell, 576 U.S. 473 (2015), where it turns out that the Secretary of Health and Human Services is a state, at least according to John Roberts's majority opinion.

Although Hershovitz's arguments throughout the book are creative and thought-provoking, it can be hard to get a firm and precise grasp of the central claims at stake. This is unsurprising given the promising ambition of the text, as Hershovitz is seeking to reframe a longstanding debate in jurisprudence. There are two central claims, offered in Chapters One and Three: "law is a moral practice" and "law is not a set of norms". There are more and less contentious understandings of both claims. Many of Hershovitz's arguments take well-known positions and theorists as foils, suggesting that we should understand those central theses as substantively contentious. However, some of his arguments and some of his descriptions would equally or even better support widely palatable claims.[3]

To illustrate, let me say something more about each claim. I begin with the claim about legal practice. Hershovitz aims to convince us that law is a practice aimed at adjusting our moral rights and responsibilities. Legislators aim to impose new moral obligations on us and to grant new moral licenses to officials, for instance. Of course, they don't always succeed. But sometimes they do, and so legal practice "might, in the right circumstance, rearrange people's moral relationships" (28). However, there are modest claims about legal practice that nearly everyone could accept. Those making, interpreting, and enforcing the law often intend to make a moral difference, and making, interpreting, and enforcing the law often does make a moral difference. Imagine a legislature considering an amendment to § 5552 extending the limitations period. A legislature considering that change would surely be thinking about the moral stakes, and it is not implausible that legislative action here could change what is morally permissible for a prosecutor to do.

But even if these are important reminders about the aims and significance of legal practice, they do not seem to be in tension with familiar jurisprudential positions. Natural lawyers

[3] For examples of similar questions about the significance of claims like these, especially in light of nearby and significantly less controversial variants, see Bix (2014), Felipe Jiménez (2021), Alexander (2021), Nina Varsava (2024), and Brian Leiter (2024).

like Mark Murphy might claim that law's nature has essentially to do with morality, while legal positivists like Jeremy Bentham and H. L. A. Hart might deny that. Nonetheless, Murphy, Bentham, and Hart can all accept more modest claims about what people sometimes try to do and about the effects that legal practice at least sometime has. But these mild acknowledgments about the relevance of morality to legal practice and about the relevance of legal practice to morality do not require us to accept any particularly controversial claims about the essence of law or legal practice.

What of the claim about legal content? The legal-content claim denies an entire family of rival views, the family that claims that law is a (single) set of norms. Pennsylvania's law tells me not to insult the flag, and it tells the state's prosecutors to prosecute relatively quickly or not at all. We might think the law is the set of norms like those. And if the law is a set of norms, we can ask, "Which norms are in that set?". Thus, the intuitively attractive thought about the nature of law helps us understand the jurisprudential disagreement between positivists and anti-positivists. Are the legal norms picked out solely by social facts, like votes, statements, and attitudes? Or do moral facts matter in the determination of the legal norms?

Against the intuitive view that the law is a set of norms, Hershovitz points out that many sets of norms are relevant to the practice of law. Depending on our circumstances and particular interests, we might be interested in norms intended by legislators, norms understood by officials, norms enforced by officials, norms followed by subjects, or norms which are binding (or other norms besides!). Each of these possible interests marks a different set of norms, and each of those sets of norms can matter for legal practice. If, for example, you are a lawyer providing advice to a client looking to avoid being ensnared by legal sanctions, what legal officials believe and what they are likely to do will be particularly important for you. On the other hand, if you are a subject, trying to figure out what you should do, you are interested in the binding norms which effectively give you reason to act. Because there are many distinctive sets of norms relevant to legal practice, Hershovitz argues that law cannot be *a* set of norms. This is a striking claim! If this is right, then the disagreement between the positivists and anti-positivists may be a mistake, for the disputants may be talking about different sets of norms. We should be positivists, for instance, about what legal officials believe and about what they do. And that sort of positivism poses no threat to being anti-positivists about the set of binding norms.

But as with the legal-practice claim, here too a relatively modest alternative is nearby. Of course, different sets of norms can be relevant in different circumstances. That is familiar from ordinary life: although I am (hopefully) often interested in what morality tells me I should do, I am also sometimes interested in how others will treat me, and thus I am also

sometimes interested in what others believe about morality. But that many sets of norms are of potential practical interest does not mean that one of those sets might not be of privileged interest. Here, Hershovitz's commitment is equivocal, for he gives pride of place to the authoritative norms. On Hershovitz's telling, the norms that we contest in court and the norms that courts seek to apply are the authoritative norms. Indeed, the central moral practice claim, that "the activities we associate with law … are oriented toward rearranging our rights and responsibilities in the ordinary moral sense" (182), is the claim that legal practice is oriented toward the set of authoritative norms.

Consider a mathematics lesson in an imagined elementary school classroom. We could be interested in what a textbook tells us about addition, in what the students think about addition, or in how the teacher grades a quiz on addition. Despite all of that, we might think that there are distinctively interesting norms of mathematics itself, norms that tell us that 2 + 2 is 4. Of course, those other norms might affect what we should do, all things considered. A teacher might have good reason to follow their students' mistaken addition norms in working a problem on the board if doing so would prompt their students to object in pedagogically valuable fashion, and a student interested in a high grade should provide the quiz answers their teacher expects, even if the teacher is mathematically mistaken. Thus, I suspect that the better read here and in the case of the law is that there is a particularly significant set of norms, viz., the authoritative norms, but that set is just one set of norms important for practice.[4]

Hershovitz offers a second argument for pluralism regarding the sets of norms in the law, this one to distinguish himself from fellow travelers Ronald Dworkin and Mark Greenberg. All three agree that legal norms are moral norms, and so all three agree that legal norms do not occupy a separate normative domain. But they disagree as to which moral norms are legal norms. Dworkin points to the moral norms which are enforceable in courts, and Greenberg points to moral norms changed by legal practice. These two ways of picking out the relevant norms can come apart. The moral norm against murder is enforceable in courts, but the moral norm against murder is not a norm created or changed by legal

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[4] I'm not claiming that jurisprudence must center the set of authoritative norms. That is a substantive position which could reasonably be denied. However, the points Hershovitz makes about the authoritative norms are the very sort of points you would expect to find in an argument seeking to establish which set of norms was of distinctive interest. For example, *if* you think a central, distinctive feature of law is that law is right, not mere might, *then* you might be tempted to the authoritative set. But, of course, if you have other views about what makes law distinctive, you might be tempted to other sets.

practice. On the other hand, New York City's mala prohibita parking norms are the products of legal practice, and yet there are cases where those are not enforceable (as visiting diplomats are well aware). We might think that the diplomats act wrongly in light of those parking rules, even if we cannot hold them accountable. Likewise, substantive contract law might recognize valid but unenforceable contracts (e.g., some oral contracts).

Rather than aligning with either Dworkin or Greenberg, Hershovitz appeals to his practice strategy: different sets of authoritative norms are of interest to legal practice at different times. If we are asking about what we as subjects are morally permitted to do, our interests include the impact on moral norms occasioned by legal practice has occasioned. If, however, we are interested in whether an official can permissibly use the power of the state to incarcerate us, we are interested in the norms which are enforceable in court. Neither of these sets provides an exclusive list of the authoritative norms which are of appropriate interest to legal practice. There may well be moral norms occasioned by legal practice which are not enforceable, and there may well be enforceable norms which exist independently of legal practice. Thus, again, there is no one set of norms which is the law.[5] But even here, there is a nearby, far less contentious claim. In thinking about the authoritative significance of the law, we should not lose sight of the fact that the law affects both subjects and officials, and sometimes in different ways.

For both of Hershovitz's central claims, then, there are widely palatable understandings which many would already accept, regardless of their jurisprudential commitments. Hershovitz does not explain why these understandings would not do, and often his descriptions and arguments seem to line up just as well with the more palatable understandings than with the more contentious understandings of his claims. Of course, theorists and practitioners may let these uncontroversial points slip from their attention. Failing to keep these uncontroversial claims in mind will distort our thinking and practice. And so, even if these alternatives are relatively philosophically uncontroversial, we might see in Hershovitz's arguments a "plea to pay attention to the full range of moral consequences that our legal practices might have" (132). We should remember that legal activity can be morally significant, we should remember that there is more to law than authoritative norms, and perhaps most importantly, we should keep the contours and details of legal practice in mind as we theorize. Nonetheless, the reader is likely to be left uncertain about what is ultimately at stake at key points in Hershovitz's arguments.

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[5] Thus, Hershovitz has two different pluralisms about legal norms. On the first pluralism, we should recognize that authoritative legal norms are just one set of relevant legal norms. On the second pluralism, we should recognize that there are imperfectly overlapping subsets of the authoritative legal norms.

In the remainder of the paper, I consider the conjunction of Hershovitz's denial that the law is a set of norms and his view that there is no distinctive domain of legal normativity because legal norms are moral norms. While each of these views is rich and worth consideration on its own, I suspect that they are in tension with each other. This potential tension is brought to light by the consideration of the criminal law across Chapters Four and Five.

The arguments in these two chapters are provocative and interesting. For example, I found Hershovitz's discussion of promising in Chapter Four helpful in thinking about imperfect and unjust laws.[6] Promising is a familiar moral practice. In an ordinary case, the fact that I promised you that I would do something creates a new moral obligation that binds me. This does not require us to invoke a separate normative domain. Although we might think that there are aesthetic and mathematical reasons which are distinct from moral reasons, we do not need to add promissory reasons alongside those three. Instead, what makes an obligation a promissory obligation is the practice that gave rise to it, not any distinctive normative domain it occupies.

Of course, we sometimes make promises we should not make. For example, a parent might forget the date of their child's school play and then promise to help a friend with a chore at the same time. Even though this promise is not ideal and should not have been made, it can result in a binding moral obligation. The parent's non-ideal promise gives them reason to help their friend, and they have a new, if non-ideal moral reason to miss their child's play. If they decide to attend the play, they have broken the promise to the friend, and they owe the friend at least an apology. On the other hand, if the parent fulfills the promise and misses the play, they may owe their child an apology. They have made a mess of things with their promise! Still, the promise can create a new moral obligation even though it would have been better for the parent not to have made the promise in the first place. Likewise for the law, argues Hershovitz. Our legal practices regularly give rise to non-ideal moral rights and obligations. Suppose that the ideal statute of limitations would be a three-year term, not a two-year term. Nonetheless, § 5552 gives me a moral right to be free from prosecution after two years. Hershovitz's appeal to promises shows that there is nothing puzzling here about our moral rights and obligations being malleable and being non-ideal.[7]

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[6] The appeal to the normative limits of promising is familiar ground for Hershovitz. See his (2014), citing Jeremy Waldron (2013).

[7] It should not be surprising that our social practices, even our imperfect social practices, affect our moral obligations. What counts as showing respect will vary from place to place, and so morality will demand different particulars from us depending on social history and circumstance. What counts as helping someone overcome an insult will vary from insult to

However, the normative power of the social practice of promising is not unlimited, as Hershovitz explains. What if you promise to join a murderous criminal conspiracy? Despite this promise, you are morally permitted to report the conspiracy to the authorities, and your promise does not bind you to commit the crime. Although the practice of promises ordinarily allows us to adjust our obligations and others' rights, this promise failed in that attempt.[8] Then Hershovitz argues that "promises are like rules: you can't break them unless they're binding" (97). You might, nonetheless, join the murderous conspiracy, and so it is possible to do what the promise describes. However, the promise does not bind you, and so you cannot break it.

Hershovitz argues that things are likewise for particularly noxious legislative acts, such as the Fugitive Slave Act or statutes aimed at the segregation of public spaces. Those bits of legal practice "purported to create rights and duties, but they failed in that" (109).[9] The Fugitive Slave Act failed to morally obligate anyone to forcefully convey people trying to make their way to freedom back into bondage. Of course, figuring out just where the line is between non-ideal but efficacious legislating and legislating so noxious it is morally inefficacious requires difficult and contentious moral philosophy, but likewise for promising. Thus, Hershovitz's moral practice account of the law can help us rethink cases where the law seemingly falls short, and sometimes very far short, of justice.[10]

However, insofar as Hershovitz's discussion of "starkly immoral laws ... that supported slavery and segregation" is intended to include starkly immoral criminal laws, promising seems an imperfect model. The main moral aim of making a promise is to bind yourself.

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insult, and so morality will demand different particulars from us depending on the social history and circumstance. On Hershovitz's argument, there is little different in the case of legal practice and the moral rights and obligations which stem from that practice.

[8] You might think that this oversimplifies things. You might think that the promise does create some sort of obligation, but a slight obligation, one dwarfed by the obligation not to murder. I am sympathetic to the idea that some promises are so bad that they create no reason at all, and so even if this murderous promise creates an outweighed obligation, I suspect that some worse promise has no such effect.

[9] Hershovitz recognizes that the passage of the Fugitive Slave Act was not morally inert. At the least, its passage created important moral reasons to seek political reform and even to interfere with officials attempting to apply the law.

[10] Although everyone should agree that the Fugitive Slave Act failed to create a moral obligation to help uphold chattel slavery, some want to capture the intuition that the Fugitive Slave Act still created a *legal* obligation to help uphold chattel slavery. See e.g. Emad Atiq (2020) and Watson (2022). For Atiq and Watson, the tension between the moral-practice theory and our intuitive view calls for explanation. As I will argue here, it is unclear that Hershovitz can easily maintain that the FSA did not create a legal obligation.

Some elements of the Fugitive Slave Act did aim at binding the United States. For example, § 8 provides a schedule of fees to be paid to marshals, deputies, and clerks who administer the Act's provisions. But the Fugitive Slave Act also included criminal law provisions ostensibly governing the behavior of the American public. Section 7 criminalized obstructing the arrest of those escaping from slavery, it criminalized harboring those seeking to escape from slavery, and it criminalized rescuing anyone seeking to escape from slavery. Unlike in the case of promising, Section 7's provisions were intended to govern the audience of the law, not the utterer of the law. Moreover, plausibly, the Fugitive Slave Act was not intended to create new moral obligations. Hershovitz notes that legislatures enacting statutes like this "simply did not see what they were up to as immoral" (109). But we can say more than this. I suspect that the legislators advancing the Fugitive Slave Act thought that aiding escapes and hindering recapture were immoral even before the enactment of the Act. They plausibly took that behavior as always wrongful (though, of course, they were terribly mistaken). Rather than changing what morality demanded of the public, they had other aims in mind, e.g., attaching penalties to wrongful behavior or expressing public condemnation of wrongful behavior. Here, too, is another way that the appeal to immoral promises seems inapt, insofar as promises ordinarily seek to create a new obligation.

A deeper problem looms for the criminal law, even in ostensibly ordinary cases. We can distinguish the Fugitive Slave Act's criminalization provisions from mala prohibita criminalization. As Hershovitz explains, legal practices regarding parking can change where we are morally permitted to park (121). If a city restricts where you can park during a snowstorm, that restriction and the complex moral machinery which that restriction beings along with it make what had been permissible before now impermissible. In that case, then, the aim of the legislature is to change the public's moral rights and obligations. But the Fugitive Slave Act should be understood as a deeply misguided attempt at mala in se criminalization. Its aim was in that way similar to the aim of the Pennsylvania legislature in criminalizing murder in Title 25 §§ 2501-2502; in both cases, a legislature criminalized behavior it took to already be morally forbidden. In mala in se cases, we should not expect the criminalization of a particular form of behavior to either make the behavior wrong or make the behavior more blameworthy. As Hershovitz explains, "Murder is wrong regardless of what the state has to say about it" (120).

If we follow Greenberg in thinking that the law is the set of norms created or changed by legal practice, and if legislative action like the Fugitive Slave Act or 25 Pa. Code §§2501-2502 don't aim at changing whether these acts are morally permitted or even how morally transgressive these acts are, we face a bind. Whatever moral effects these bits of legal practice have, they do not create moral norms like "do not murder." If we accept a moral-

impact theory of the content of the law, it looks like we should conclude that murderers do not break the law.[11] If so, then not only is a seriously unjust law no law at all, but many just laws are also no law at all. This does not mean that there are no laws. We should obey at least some stop signs at least sometimes. Still, reducing the set of legal obligations this way is deeply revisionary. And because so much of criminal-law practice is aimed at mala in se criminalization, this deep revision is not at the margins of legal practice.[12]

Hershovitz, however, has a more permissive account of the content of legal norms, grounded in his pluralism. Criminalization in these cases is not exclusively aimed at changing the moral norms which demand decent behavior from the public. Instead, a good deal of criminalization is aimed at changing when officials and courts are permitted to

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[11] This is a different worry than Joseph Raz's paradox of just law (1984). Raz worried that, where we have reasons of justice to do what just laws require, we should conform to those laws but not obey them. My concern is not about why we should not murder; it is about whether murdering violates the law. Greenberg raises this worry, and he offers a number of difference-making answers similar to those Hershovitz considers for mala prohibita wrongs. Greenberg adds one more answer: the law can make precise an imprecise moral norm. He writes:

> Consider the case of statutory rape. Before action by legal institutions, the content of the moral prohibition will be relatively vague, perhaps something along the lines of: sex with children is prohibited. Once the legal institutions have acted, the content of the prohibition will typically be much more precise. For example, the actions of the legislature may result in a precise age of consent. (2013, 1320)

I am suspicious of this argument. The enactment of a statutory rape provision may create a bright-line rule regarding the moral permissibility of criminal prosecution, and it may render assaults of those below the age of consent wrong in some additional way. That is, the criminalization of statutory rape may *supplement* a vague moral norm. But the criminalization does not transform the existing moral norm from vague to precise. The vague moral norm remains vague. Assaulting someone just after their birthday on the year of legal maturity is morally wrong in virtually the same way and to virtually the same degree it was just on the day before (and I say virtually only because of those potential supplementary effects). In any case, Hershovitz says, and I agree, that the criminal law does not make mala in se wrongs forbidden or more blameworthy.

[12] Hershovitz elsewhere says that cases where the law is enforcing moral rights and obligations that come from non-legal sources (there discussing custom) are "marginal cases" (41). It might be that customary law is relatively marginal, but the broader set of cases where the law enforcing moral rights and obligations with extra-legal sources (including morality itself) is not marginal, and, optimistically, much of the criminal law aims to enforce pre-existing moral rights and obligations. We should not consider great swaths of the criminal law marginal to thinking about the law.

intervene.[13] Norms of legality make it impermissible for the state to bring the criminal law to bear on an ad hoc basis. As Hershovitz explains, "the point of the principle of legality is to constrain the state—to make it say how it will use its power to punish in advance, so as to guard against all the ways it might abuse people if it had the power to define crimes ex post" (124). Mala prohibita parking laws and mala in se laws like Pennsylvania's §§ 2501-2502 all adjust the state's moral profile, giving the state new moral rights to prosecute it had previously lacked.

But Hershovitz does not just say that legal norms include the adjustments to the state's power to enforce (as Greenberg might). That would be a reference to the set of moral changes arising from legal practice, but it would be a reference to norms binding officials. Instead, Hershovitz says that some obligations are legal because they are properly enforceable by legal institutions (39). That is, there are multiple ways that a norm counts as a legal norm: it might be created by legal practice, it might be enforceable by legal practice, or it might be the proper concern of legal officials. Each of these picks out a different set of authoritative legal norms. Thus, the proscription against murder is a legal norm in at least one important sense, and the proscription against murder is independently morally binding, so we can make sense of murder breaking the law.

The principle of legality Hershovitz invokes is attractive, and criminalization does seem to play a key role in making criminal prosecution morally permissible. However, Hershovitz's appeal to legality and to the set of norms which courts may enforce raises three worries.

First, what should we say about cases where these sets of authoritative norms come apart? Recall that the set of moral norms created or changed by legal practice can come apart from the set of moral norms which courts may enforce. The moral norm forbidding murder is not created or changed by legal practice, and yet courts may (given proper advance criminalization) enforce that norm. And legal practice may create legally unenforceable but morally binding contract norms, as in cases of certain oral agreements. But what if the two sets come apart more than this?

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[13] Greenberg appeals to the adjustment of redress rights as well, but it is not clear how to accommodate this move given his monism. Even if the criminal law changes the rights and obligations of the courts, it is not clear how those changes are to explain the fact that murderers break the law. Appealing to the state's right to hold you accountable for murder to explain the existence of the underlying obligation not to murder gets the explanation backwards. If anything, the obligations connected to the right of redress should be obligations to accept redress. Thus, the obligations created with the right to redress might include the obligation to stand trial and the obligation to serve out a sentence. Notice that violating the underlying norm is not just consistent with redress but necessary for redress!

Hershovitz considers the carefully constructed case of a stop sign in the middle of the wide-open desert. The stop sign ostensibly commands all drivers to stop, but given adequate care on a particular driver's part, morality is indifferent as to whether the driver stops. Hershovitz concludes that there is nothing wrong with a rolling stop, provided you are justified in your careful assessment that rolling through the stop sign is perfectly safe. Thus, "the state sometimes has standing to punish you when you've done nothing wrong—nothing you ought not to have done" (132). This is a surprising thought, given the broader jurisprudential picture. Recall that Hershovitz tells us that you cannot break a rule unless it is binding. Thus, on Hershovitz's account, even if the state is permitted to fine the driver for not stopping, the stopping norm did not bind the driver, and so the driver did not break the norm. It looks like we can have permissible prosecutions without underlying violations![14]

The second worry about the appeal via the principle of legality to the enforceable norms is that the legality reasons seem to apply to the criminalizations of the Fugitive Slave Act just as they do to parking rules and mala in se crimes. The principle of legality "requires that the law define an offense before people are punished for it" (124). This is to guard against a particular worry: that the state will abuse people if it has the power to craft criminal offenses ex post to fit those whom it seeks to punish.[15] The enactment of the Fugitive Slave Act addresses those very concerns. Regardless of how morally misguided the Act was, its enactment can be understood as part of a practice of making public those behaviors that might subsequently be punished. Prosecuting someone for assisting an enslaved person to escape to liberty was always immoral. However, prosecuting someone for assisting an enslaved person to escape to liberty would have been immoral for an additional reason prior to the passage of the Fugitive Slave Act: it would have been part of a practice of defining crimes ex post.

Thus, the enactment of the Fugitive Slave Act successfully changed the moral situation.[16] It defused a particular objection, viz., the claim against being prosecuted for a crime defined

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[14] It is not clear that standing is the issue in this case. Legal standing tells us *who* is entitled to bring a claim. Thus, as Hershovitz explains, the state's authority to prosecute is often derivative of victims' existing interests in vindication. In cases where you've done nothing wrong, we might think that the central question is whether you are legally liable at all, not to whom you are liable.

[15] Hershovitz gives Antonin Scalia substantial attention in his discussion of legal interpretation, and he finds some common ground in Scalia's moral justification of his textualism. Here, similarly, Hershovitz's appeal to worries about state abuse parallels Scalia's invocation of Nero posting his edicts too high to be read. See Scalia (2018).

[16] It is unclear whether Hershovitz thinks that the enactment of the Fugitive Slave Act was even partially successful. At some point, he says that "starkly immoral laws, like the ones that supported slavery and segregation[, ...] were not capable of making a moral

ex post. And this effect is exactly the effect that Hershovitz associates with successful mala in se criminalizing. Of course, that the Fugitive Slave Act satisfies reasons of legality does not mean that it is appropriate for courts to hold anyone accountable under the Act. As Hershovitz makes clear, the principle of legality is just one principle that bears on this practical question. And it might well be the case that, whatever technical demands are satisfied, it is never appropriate to hold someone accountable for violating a deeply immoral demand. Still, the legality objection would be inapt, and this means that the Fugitive Slave Act, as immoral as it was, is legally significant. Hershovitz is right that the passage of the Fugitive Slave Act means nothing for whether we should comply with such a statute, and he is right that the government is not morally permitted to enforce the Fugitive Slave Act. Nonetheless, those are not the only ways that legislative action can be significant. This may just be further grist for Hershovitz's pluralism, for now we have identified more questions that may arise in the practice of law. Still, this does commit Hershovitz to more space for grievously immoral law than he acknowledges. Despite its immorality, the enactment of the Fugitive Slave Act has the same immediate moral impact as the enactment of other laws aimed at proscribing mala in se wrongs.[17]

But this brings us to the third worry: the appeal to the enforceable norms suggests that the standard view lies in the wings. Recall that the standard view claimed that the law was a set of norms and that we find the content of those norms in the meaning of legal materials. Hershovitz, by contrast, denies that the law is a set of norms and pushes us to instead see legal significance in legal practice. Now consider the enactments which can satisfy legality concerns about ex post criminalization. These enactments must adequately describe the behavior criminalized so that it is ordinarily possible to determine whether a subject's behavior falls within the description. That description must be relatively fixed, and it must be capable of serving as a measure or standard for evaluating behavior. Otherwise, the enactment will do little to prevent ex post criminalization. Relying upon the meaning of a

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difference" (108). At another point, however, he says that the Fugitive Slave Act may have changed how judges, and especially trial judges, should reason. We might think that judges, and especially trial judges, should be hesitant to substitute their moral judgment for that of higher judges or that of legislators (110). Here, again, we can see affinities between Hershovitz and Scalia. However, even if judges should show some moral deference, perhaps as a *prima facie* matter, the Fugitive Slave Act's commands seem suitably egregious to permit even a trial court judge to rely on their own accurate assessment of the matter.

[17] This concession might be dialectically good for Hershovitz. Although it is surely right that the Fugitive Slave Act provides no reason to interfere with someone's escaping from chattel slavery, it does seem that the Fugitive Slave Act is law in some sense, as Atiq and Watson point out. This concession can account for that.

legal text containing the description of the forbidden behavior seems like a good way satisfy these concerns. Thus, to address legality concerns, we rely upon a norm extracted from existing legal materials by looking at the meaning of those legal materials. This looks awfully like the standard view of law, introduced at the outset.

Is this upshot of Hershovitz's pluralism about the law's norms the canary in the coal mine? I suspect so, although I merely raise that question here. In the meantime, Hershovitz faces a dilemma. If, as Greenberg suggests, the law's norms are the changes legal practice makes to our moral norms, then we will have a hard time explaining why murder breaks the law. We might have to take on significant revision in our legal talk. If, on the other hand, the law includes some norms that are referenced, as in Hershovitz's appeal to the norms enforceable in court, then the standard view has re-entered the picture.

Even if I cannot wholeheartedly endorse Law Is a Moral Practice, I do wholeheartedly recommend it. Hershovitz has given us an engaging, creative, and enjoyably ambitious text. It is worth dwelling on the moral effects of legal practices, and it is worth remembering that there is more to the law than any one set of binding norms. And I am deeply sympathetic to Hershovitz's argument that many of our jurisprudential disagreements might reflect an unneeded commitment to thinking there is one thing that we are all arguing about. While I am not yet convinced by the claim that law is a social practice rather than a set of norms nor by the claim that there is no distinctive domain of legal normativity, I think Hershovitz is exactly right that it is worth trying these ideas on to see where that leads you.[18]

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