Greenberg Got it Wrong: What Legal Practice Does and Does Not Reveal About Legal Content

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Dale Smith, *The Practice-Based Objection to the `Standard Picture' of How Law Works*, 10 **Jurisprudence** 502 (2019).

There is a default theory of legal content that many legal positivists – and non-positivists – accept. It is that the legal contents of texts, or of authoritative pronouncements in general, are, or match, their full (that is, pragmatically-enriched) linguistic contents. Nine years ago, Mark Greenberg published an influential article called *The Standard Picture and Its Discontents*, attacking what he called the "Standard Picture" predominant among legal theorists. The aforementioned default theory of legal content is one of what Greenberg called the Standard Picture's "prongs." Among Greenberg's objections to this theory, which is sometimes referred to as a "communicative content theory" of law, is that it cannot account for aspects of familiar legal practice.[1] Dale Smith refers to this type of objection as a "practice-based objection." (He notes that Greenberg is not the only legal theorist to raise a practice-based objection to the communicative content theory.) Practice-based objections, from Greenberg and others, depict an apparent gap between communicative content and legal content. This gap is especially troublesome for many theorists of statutory legal content. In particular, the gap poses a problem for anyone attracted to the idea that statutes are communications from the legislature and ought to be understood and applied the way ordinary communications are.

In this intriguing article, Smith is both friend to a communicative content theory and foe. He is a friend by demonstrating, again and again, how practice-based objections raised so far can be accommodated by such a theory. But he turns foe with his consideration of the practice of using what he refers to as "retrospectively operating modifier laws." His thesis is that practice-based objections to date are not fatal to a communicative content theory of law, but that there is a practice-based objection that may be.

Smith's central point from legal practice is that retrospectively operating modifier laws are treated in practice as altering the legal effect of earlier statutory provisions. This produces a gap, sometimes quite significant, between the linguistic meaning of an earlier statute and its legal effect. One of his chief examples is a section of the 1998 Human Rights Act, which changed, in an important way, the interpretation of earlier U. K. statutes. He argues that a statute such as the Human Rights Act cannot be treated as a direction to judges to make new law. Nor is its legal effect a simple aggregation of the linguistic meanings of the earlier statute and the relevant section of the Human Rights act. Rather, the later modifier law substitutes one legal effect (without, in the case of the Human Rights law, sufficiently specifying that substitution) for what the earlier statute's pragmatically-enriched linguistic content might suggest.

In his argument, Smith assumes that no satisfactory account of pragmatic enrichment of language can take a later modifier law as an input. That assumption appeals to the many legal theorists committed to the view that the pragmatics of statutory language must make essential reference to the intention(s) of the enacting legislature (either actual or what it would be reasonable to suppose they were). (The relevant intentions might be alleged to be either communicative or referential.) If Smith is correct in his assumption, he has made a valuable contribution by clarifying what legal practice does and does not reveal about legal content as communication (according to the received wisdom about the nature of communication). But I must add a cautionary note. It would be premature to conclude that Smith's is the last word on the communicative content theory. Whether it is depends, in part, on the success of the theory of legal content elucidated by Hrafn Asgeirsson in the first chapter of his **The Nature and Value of Vagueness in Law** (2020). The debate, in other words, goes on.

1. Mark Greenberg, *The Standard Picture and Its Discontents*, *in* **Oxford Studies in Philosophy of Law** (Leslie Green and Brian Leiter, eds., 2011).

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